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P R I N C I P L E S

O F

E Q U I T Y.

THE THIRD EDITION.

IN TWO VOLUMES.



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J. & F. ANDERSON,  
W. S.  
EDINBURGH.

*Thompson*  
*Esqr*  
P R I N C I P L E S

O F

E Q U I T Y.

T H E T H I R D E D I T I O N.

I N T W O V O L U M E S.


V O L. I.

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E D I N B U R G H:

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THE THIRD EDITION

IN TWO VOLUMES

VOL. I



# LETTER

TO

Lord MANSFIELD.

**A**N author, not more illustrious by birth than by genius, says, in a letter concerning enthusiasm, " That he had so  
" much need of some considerable  
" presence or company to raise  
" his thoughts on any occasion,  
" that when alone he endeavour-  
" ed to supply that want by fan-  
" cying some great man of supe-  
" rior genius, whose imagin'd pre-  
" sence might inspire him with  
" more



vi      L E T T E R    to

“ more than what he felt at ordinary hours.” To judge from his Lordship’s writings, this receipt must be a good one. It naturally ought to be so; and I imagine that I have more than once felt its enlivening influence. With respect to the first edition of this treatise in particular, I can affirm with great truth, that *a great man of superior genius* was never out of my view: Will Lord Mansfield relish this passage—How would he have exprest it—were my constant questions,

BUT though by this means I commanded more vigour of mind, and a keener exertion of thought, than I am capable of *at ordinary hours*; yet I had not courage to  
mention

mention this to his Lordship, nor to the world. The subject I had undertaken was new : I could not hope to avoid errors, perhaps gross ones ; and the absurdity appear'd glaring, of acknowledging a sort of inspiration in a performance that might not exhibit the least spark of it.

No trouble has been declined upon the present edition ; and yet that the work, even in its improved state, deserves his Lordship's patronage, I am far from being confident. But however that be, it is no longer in my power to conceal, that the ambition of gaining Lord Mansfield's approbation has been my chief support in this work.

viii LETTER to, &c.

work. Never to reveal that secret  
would be to border on ingratitude.

Will your Lordship permit me  
to subscribe myself, with heart-  
satisfaction,

Your zealous friend,

HENRY HOME.

August 1766.

## PREFACE to the Second Edition.

*AN* author who exerts his talents and industry upon a new subject, without hope of assistance from others, is apt to flatter himself; because he finds no other work of the kind to humble him by comparison. The attempt to digest equity into a regular system, was not only new, but difficult; and for these reasons, the author hopes he may be excused for not discovering more early several imperfections in the first edition of this book. These imperfections he the more regretted, because they concerned chiefly the arrangement, in which every mistake must be attended with some degree of obscurity. No labour has been spared to improve the present edition: and yet, after all his endeavours, the author dare not hope that every imperfection is cured: that the arrangement is considerably improved, is all that with assurance he can take upon him to say.

For an interim gratification of the reader's curiosity before entering upon the work, a few

VOL. I.

b

particulars



## P R E F A C E.

particulars shall here be mentioned. The defects of common law seemed to the author so distinct from its excesses, that he thought it proper to handle these articles separately. But almost as soon as the printing was finished, the author observed that he had been obliged to handle the same subject in different parts of the book, or at least to refer from one part to another; which he holds to be an infallible mark of an unskilful distribution. This led him to reflect, that these defects and excesses proceed both of them equally from the very constitution of a court of common law, too limited in its power of doing justice; whence it appeared evident that they ought to be handled promiscuously as so many examples of imperfection in common law, which ought to be supplied by a court of equity. This is so evident, that even in the same case we find common law sometimes defective, sometimes excessive, according to occasional or accidental circumstances, without any fundamental difference. For example, many claims, good at common law, are reprobated in equity because of some incidental wrong that comes not under the cognisance of common law. A claim of this kind must be sustained by a court of common law, which cannot regard the incidental

# P R E F A C E. xi

*idental wrong ; and in such instances common law is excessive, by transgressing the bounds of justice. On the other hand, where a claim for reparation is brought by the person who suffered the wrong, a court of common law can give no redress ; and in such instances common law is defective. And yet the ratio decidendi is precisely the same in both cases, namely, the limited power of a court of common law.*

*The transgression of a deed or covenant is a wrong that ought to be distinguished from a wrong that misleads a man to make a covenant or to grant a deed. The former only belongs to the chapter Of Covenants ; the latter, to the chapter Of the powers of a court of equity to protect individuals from injuries. For example, a man is fraudulently induced to enter into a contract : the reparation of this wrong, which is antecedent to the contract, cannot arise from the contract ; and for that reason it is put under the chapter last mentioned.*

## PREFACE to the Present Edition.

*A*N useful book ought not to be a costly book.

To bring this edition within a moderate price, not only the size is smaller, but the preliminary discourse on the principles of morality is left out, being published more complete in Sketches of the History of Man.

To mould the principles of equity into a regular system, was a bold undertaking. The pleasure of novelty gave it a lustre, and made every article appear to be in its proper place. The subject being more familiar in labouring upon a second edition, the many errors I discovered produced an arrangement differing considerably from the former. My satisfaction however in the new arrangement, was not entire: the errors I had fallen into produced a degree of diffidence and a suspicion of more. And now, after an interval of no fewer than ten years, I find the suspicion but too well founded, chiefly with respect to the extensive chapter of deeds and covenants. The many divisions and subdivisions of that chapter, I judged

*judged at the time to be necessary; but after pondering long and frequently upon them, I became sensible that they tend to darken rather than to enlighten the subject. That chapter is now divided into fewer and more distinct heads; which I expect will be found a considerable improvement. In an institute of law or of any other science, the analyzing it into its constituent parts, and the arranging every article properly, is of supreme importance. One would not conceive, without experience, how greatly accurate distribution contributes to clear conception. Before I was far advanced in the present edition, the many errors I found in the distribution surprised and vexed me. I have bestowed much pains in correcting these errors; and yet I will not answer that there are none left. Many escaped me before; and some may again escape me. No work of man is perfect: it is good however to be on the mending hand; and in every new attempt, to approach nearer and nearer to perfection. To compile a body of law, the parts intimately connected and every link hanging on a former, requires the utmost effort of the human genius. Have I not reason to think so, considering how imperfect in that respect the far greater part*  
*of*



*of law-books are ; witness in particular the famous body of Roman law compiled under the auspices of the Emperor Justinian, remarkable even among law-books for defective arrangement ? Let the candid reader keep this in view, and he will be indulgent to the errors of arrangement in this edition, if after my utmost application any remain.*

*But imperfect arrangement in the former editions, is not the only thing that requires an apology. Frequent and serious reflection on a favourite subject, have unfolded to me several errors, still more material, as they concern the reasoning branch of my subject. These I blush for ; and yet, to acknowledge an erroneous opinion, sits lighter on my mind than to persevere in it.*

CON-

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EXPLA-

## EXPLANATION of some SCOTCH law terms used in this Work.

Adjudication, is a judicial conveyance of the debtor's land for the creditor's security and payment. It corresponds to the English *Elegit*.

Arrestment, defined, book 3. chap. 4.

Cautioner, a surety for a debt.

Cedent, assignor.

Contravention. An act of contravention signifies the breaking through any restraint imposed by deed, by covenant, or by a court.

Decree of forthcoming, defined, book 3. chap. 4.

Fiar, he that has the fee or feu; and the proprietor is termed *fiar*, in contradistinction to the liferenter.

Gratuitous, *see* Voluntary.

Heritor, a proprietor of land.

Inhibition, defined, book 3. chap. 4.

Lefion, loss, damage.

Pursuer, plaintiff.

Propone.

## EXPLANATION of SCOTCH law terms.

**Propone.** To propone a defence is to state or move a defence.

**Reduction,** is a process for voiding or setting aside any consensual or judicial right.

**Tercer,** a widow that possesses the third part of her husband's land as her legal jointure.

**Voluntary,** in the law of Scotland bears its proper sense as opposed to involuntary. A deed in the English law is said to be voluntary when it is granted without a valuable consideration. In this sense it is the same with *gratuitous* in our law.

**Wadset,** answers to a mortgage in the English law. A proper wadset is where the creditor in possession of the land takes the rents in place of the interest of the sum lent. An improper wadset is where the rents are applied for payment, first of the interest, and next of the capital.

**Writer, scrivener.**

## INTRODUCTION.

**E**QUITY, scarce known to our forefathers, makes at present a great figure. It has, like a plant, been tending to maturity, slowly indeed, but constantly; and at what distance of time it shall arrive at perfection, is perhaps not easy to foretell. Courts of equity have already acquired such an extent of jurisdiction, as to obscure in a great measure courts of law. A revolution so signal, will move every curious enquirer to attempt, or to wish at least, a discovery of the cause. But vain will be the attempt, till first a clear idea be formed of the difference between a court of law and a court of equity. The former we know follows precise rules: but does the latter act by conscience solely without any rule? This would be unsafe while men are the judges, liable no less to partiality than to error: nor could a court without rules ever have attained that height of favour, and extent



## 2 INTRODUCTION.

of jurisdiction, which courts of equity enjoy. But if a court of equity be governed by rules, why are not these brought to light in a system? One would imagine, that such a system should not be useful only, but necessary; and yet writers, far from aiming at a system, have not even defined with any accuracy what equity is, nor what are its limits and extent. One operation of equity, universally acknowledged, is, to remedy imperfections in the common law, which sometimes is defective, and sometimes exceeds just bounds; and as equity is constantly opposed to common law, a just idea of the latter may probably lead to the former. In order to ascertain what is meant by common law, a historical deduction is necessary; which I the more cheerfully undertake, because the subject seems not to be put in a clear light by any writer.

After states were formed and government established, courts of law were invented to compel individuals to do their duty. This innovation, as commonly happens, was at first confined within narrow bounds. To these courts power was given to enforce duties essential to the existence

## INTRODUCTION. 3

ence of society; such as that of forbearing to do harm or mischief. Power was also given to enforce duties derived from covenants and promises, such of them at least as tend more peculiarly to the well-being of society: which was an improvement so great, as to leave no thought of proceeding farther; for to extend the authority of a court to natural duties of every sort, would, in a new experiment, have been reckoned too bold. Thus, among the Romans, many pactions were left upon conscience, without receiving any aid from courts of law: buying and selling only, with a few other covenants essential to commercial dealing, were regarded. Our courts of law in Britain were originally confined within still narrower bounds: no covenant whatever was by our forefathers countenanced with an action: a contract of buying and selling was not\*; and as buying and selling is of all covenants the most useful in ordinary life, we are not at liberty to suppose that any other was more privileged†.

\* Reg. Maj. lib. 3. cap. 10. Fleta, lib. 2. cap. 58. § 3. and 5.

† See Historical Law-tracts, tract 2.

#### 4 INTRODUCTION

But when the great advantages of a court of law were experienced, its jurisdiction was gradually extended, with universal approbation : it was extended, with very few exceptions, to every covenant and every promise : it was extended also to other matters, till it embraced every obvious duty arising in ordinary dealings between man and man. But it was extended no farther ; experience having discovered limits, beyond which it was deemed hazardous to stretch this jurisdiction. Causes of an extraordinary nature, requiring some singular remedy, could not be safely trusted with the ordinary courts, because no rules were established to direct their proceedings in such matters ; and upon that account, such causes were appropriated to the king and council, being the paramount court (a). Of this nature

(a) We find the same regulation among the Jews : " And Moses chose able men out of all Israel, and made them heads over the people, rulers of thousands, rulers of hundreds, rulers of fifties, and rulers of tens. And they judged the people at all seasons : the hard causes they brought unto Moses, but every small matter they judged themselves." *Exodus*, xviii. 25. 26.

were

## INTRODUCTION. 3

were actions for proving the tenor or contents of a lost writ; extraordinary removings against tenants possessing by lease; the causes of pupils, orphans, and foreigners; complaints against judges and officers of law \*, and the more atrocious crimes, termed, *Pleas of the crown*. Such extraordinary causes, multiplying greatly by complex and intricate connections among individuals, became a burden too great for the king and council. In order therefore to relieve this court, extraordinary causes of a civil nature, were in England devolved upon the court of chancery; a measure the more necessary, that the king, occupied with the momentous affairs of government, and with foreign as well as domestic transactions, had not leisure for private causes. In Scotland, more remote, and therefore less interested in foreign affairs, there was not the same necessity for this innovation: our kings, however, addicted to action more than to contemplation, neglected in a great measure their privilege of being judges, and suffered causes peculiar to the king and

\* See act 105. parl. 1487.



## 6 INTRODUCTION.

council to be gradually assumed by other sovereign courts. The establishment of the court of chancery in England, made it necessary to give a name to the more ordinary branch of law that is the province of the common or ordinary courts : it is termed, *the Common Law* : and in opposition to it, the extraordinary branch devolved on the court of chancery is termed *Equity* ; the name being derived from the nature of the jurisdiction, directed less by precise rules, than *secundum æquum et bonum*, or according to what the judge in conscience thinks right (a). Thus equity, in its proper sense, comprehends every matter of law that by the common law is left without remedy ; and supposing the boundaries of the common law to be ascertained, there can no longer remain any difficulty about the powers of a court of equity. But as these boundaries are

(a) At curiæ sunt et jurisdictiones, quæ statuant ex arbitrio boni viri et discretionis sana, ubi legis norma deficit. Lex enim non sufficit casibus, sed ad ea quæ plerumque accidunt aptatur : sapientissima autem res tempus, (ut ab antiquis dictum est), et novorum casuum quotidie author et inventor. *Bacon de Aug. Scien. lib. 8. cap. 3. aphor. 32.*

## INTRODUCTION. 7

not ascertained by any natural rule, the jurisdiction of common law must depend in a great measure upon accident and arbitrary practice; and accordingly the boundaries of common law and equity, vary in different countries, and at different times in the same country. We have seen, that the common law of Britain was originally not so extensive as at present; and instances will be mentioned afterward, which evince, that the common law is in Scotland farther extended than in England. Its limits are perhaps not accurately ascertained in any country; which is to be regretted, because of the uncertainty that must follow in the practice of law. It is lucky, however, that the disease is not incurable: a good understanding between the judges of the different courts, with just notions of law, may, in time, ascertain these limits with sufficient accuracy.

Among a plain people, strangers to refinement and subtilties, law-suits may be frequent, but never are intricate. Regulations to restrain individuals from doing mischief, and to enforce performance of covenants, composed originally the bulk  
of

## 8 INTRODUCTION.

of the common law ; and these two branches, among our rude ancestors, seemed to comprehend every subject of law. The more refined duties of morality were, in that early period, little felt, and less regarded. But law, in this simple form, cannot long continue stationary : for in the social state under regular discipline, law ripens gradually with the human faculties ; and by ripeness of discernment and delicacy of sentiment, many duties, formerly neglected, are found to be binding in conscience. Such duties can no longer be neglected by courts of justice ; and as they made no part of the common law, they come naturally under the jurisdiction of a court of equity.

The chief objects of benevolence considered as a duty, are our relations, our benefactors, our masters, our servants, &c. ; and these duties, or the most obvious of them, come under the cognisance of common law. But there are other connections, which, though more transitory, produce a sense of duty. Two persons shut up in the same prison, though no way connected but by contiguity and resemblance of condition, are sensible, however, that

## INTRODUCTION. 9

that to aid and comfort each other is a duty incumbent on them. Two persons, shipwrecked upon the same desert island, are sensible of the like mutual duty. And there is even some sense of this kind, among a number of persons in the same ship, or under the same military command.

Thus mutual duties among individuals multiply by variety of connections; and in the progress of society, benevolence becomes a matter of conscience in a thousand instances, formerly disregarded. The duties that arise from connections so slender, are taken under the jurisdiction of a court of equity; which at first exercises its jurisdiction with great reserve, interposing in remarkable cases only, where the duty is palpable. But, gathering courage from success, it ventures to enforce this duty in more delicate circumstances: one case throws light upon another: men, by the reasoning of the judges, become gradually more acute in discerning their duty: the judges become more and more acute in distinguishing cases; and this branch of law is imperceptibly moulded into a system



## 10 INTRODUCTION.

stem (a). In rude ages, acts of benevolence, however peculiar the connection may be, are but faintly perceived to be our duty: such perceptions become gradually more firm and clear by custom and reflection; and when men are so far enlightened, it is the duty as well as honour of judges to interpose \*.

This branch of equitable jurisdiction shall be illustrated by various examples. When goods by labour, and perhaps with danger, are recovered from the sea after a shipwreck, every one perceives it to be the duty of the proprietor to pay salvage. A man ventures his life to save a house from fire, and is successful; no mortal can doubt that he is intitled to a recompence from the proprietor, who is benefited. If a man's affairs by his absence be in disorder,

(a) At curiæ illæ uni viro ne committantur, sed ex pluribus consistent. Nec decreta exeant cum silentio: sed iudices sententiæ suæ rationes adducant, idque palam, atque adstante corona; ut quod ipsa potestate sit liberum, fama tamen et estimatione sit circumscriptum.

*Bacon de Aug. Scient. lib. 8. cap. 3. aphor. 38.*

\* See Essays on morality and natural religion, second edition, p. 108.

der,

## I N T R O D U C T I O N. 11

der, ought not the friend who undertakes the management to be kept *indemnis*, tho' the subject upon which his money was usefully bestowed may have afterward perished casually? Who can doubt of the following proposition, That I am in the wrong to demand money from my debtor, while I with-hold the sum I owe him, which perhaps may be his only resource for doing me justice? Such a proceeding must, in the common sense of mankind, appear partial and oppressive. By the common law, however, no remedy is afforded in this case, nor in the others mentioned. But equity affords a remedy, by enforcing what in such circumstances every man perceives to be his duty. I shall add but one example more: In a violent storm, the heaviest goods are thrown over-board, in order to disburden the ship: the proprietors of the goods preserved by this means from the sea, must be sensible that it is their duty to repair the loss; for the man who has thus abandoned his goods for the common safety, ought to be in no worse condition than themselves. Equity dictates this to be their duty; and

## 12 INTRODUCTION.

if they be refractory, a court of equity will interpose in behalf of the sufferer.

It appears now clearly, that a court of equity commences at the limits of the common law, and enforces benevolence where the law of nature makes it our duty. And thus a court of equity, accompanying the law of nature in its gradual refinements, enforces every natural duty that is not provided for at common law.

The duties hitherto mentioned arise from connections independent altogether of consent. Covenants and promises also, are the source of various duties. The most obvious of these duties, being commonly declared in words, belong to common law. But every incident that can possibly occur in fulfilling a covenant, is seldom foreseen; and yet a court of common law, in giving judgement upon covenants, considers nothing but declared will, neglecting incidents that would have been provided for had they been foreseen. Further, the inductive motive for making a covenant, and its ultimate purpose and intendment, are circumstances disregarded at common law: these, however, are capital circumstances; and justice, where they are neglected,

## INTRODUCTION. 13

glected, cannot be fulfilled. Hence the powers of a court of equity with respect to engagements. It supplies imperfections in common law, by taking under consideration every material circumstance, in order that justice may be distributed in the most perfect manner. It supplies a defect in words, where will is evidently more extensive: it rejects words that unwarily go beyond will; and it gives aid to will where it happens to be obscurely or imperfectly expressed. By taking such liberty, a covenant is made effectual according to the aim and purpose of the contractors; and without such liberty, seldom it happens that justice can be accurately distributed.

In handling this branch of the subject, it is not easy to suppress a thought that comes cross the mind. The jurisdiction of a court of common law, with respect to covenants, appears to me odd and unaccountable. To find the jurisdiction of this court limited, as above mentioned, to certain duties of the law of nature, without comprehending the whole, is not singular nor anomalous. But with respect to the circumstances that occur in the same  
cause,



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cause, it cannot fail to appear singular, that a court should be confined to a few of these circumstances, neglecting others no less material in point of justice. This reflection will be set in a clear light by a single example. Every one knows, that an English double bond was a contrivance to evade the old law of this island, which prohibited the taking interest for money : the professed purpose of this bond is, to provide for interest and costs, beyond which the penal part ought not to be exacted ; and yet a court of common law, confined strictly to the words or declared will, is necessitated knowingly to commit injustice. The moment the term of payment is past, when there cannot be either costs or interest, this court, instead of pronouncing sentence for what is really due, namely, the sum borrowed, must follow the words of the bond, and give judgement for the double. This defect in the constitution of a court, is too remarkable to have been overlooked : a remedy accordingly is provided, though far from being of the most perfect kind ; and that is, a privilege to apply to the court of equity for redress. Far better had it been, either to withdraw cove-  
nants

nants altogether from the common law, or to empower the judges of that law to determine according to the principles of justice (a). I need scarce observe, that the present reflection regards England only, where equity and common law are appropriated to different courts. In Scotland, and other countries where both belong to the same court, the inconvenience mentioned cannot happen. — But to return to the gradual extension of equity, which is our present theme :

A court of equity, by long and various practice, finding its own strength and utility, and impelled by the principle of justice, boldly undertakes a matter still more arduous ; and that is, to correct or mitigate the rigour, and what even in a proper sense may be termed the *injustice* of common law. It is not in human foresight to establish any general rule, that, however salutary in the main, may not be oppressive and unjust in its application to some singular cases. Every work of man

(a) And accordingly, by 4<sup>o</sup> Annæ, cap. 16. § 13. the defendant, pending action on a double bond, offering payment of principal, interest, and costs, shall be discharged by the court.

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must partake of the imperfection of its author ; sometimes falling short of its purpose, and sometimes going beyond it. If with respect to the former a court of equity be useful, it may be pronounced necessary with respect to the latter ; for, in society, it is certainly a greater object to prevent legal oppression, which alarms every individual, than to supply legal defects, scarce regarded but by those immediately concerned. The illustrious Bacon, upon this subject, expresses himself with great propriety : “ *Habeant curiæ prætoriaræ potestatem tam subveniendi contra rigorem legis, quam supplendi defectum legis. Si enim porrigi debet remedium ei quem lex præteriit, multo magis ei quem vulneravit \**.”

All the variety of matter hitherto mentioned, is regulated by the principle of justice solely. It may, at first view, be thought, that this takes in the whole compass of law, and that there is no remaining field to be occupied by a court of equity. But, upon more narrow inspection, we find a number of law-cases into

\* De Aug. Scient. lib. 8. cap. 3. aphor. 35.

which justice enters not, but only utility. Expediency requires that these be brought under the cognisance of a court; and the court of equity, gaining daily more weight and authority, takes naturally such matters under its jurisdiction. I shall give a few examples. A lavish man submits to have his son made his interdictor: this agreement is not unjust; but, tending to the corruption of manners, by reversing the order of nature, it is reprobated by a court of equity, as *contra bonos mores*. This court goes farther: it discountenances many things in themselves indifferent, merely because of their bad tendency. A *pactum de quota litis* is in itself innocent, and may be beneficial to the client as well as to the advocate: but to remove the temptation that advocates are under to take advantage of their clients instead of serving them faithfully, this court declares against such pactions. A court of equity goes still farther, by consulting the public interest with relation to matters not otherwise bad but by occasioning unnecessary trouble and vexation to individuals. Hence the origin of regulations tending to abridge law-suits.



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A mischief that affects the whole community, figures in the imagination, and naturally moves judges to stretch out a preventive hand. But what shall we say of a mischief that affects one person only, or but a few? An estate, for example, real or personal, is left entirely without management, by the infancy of the proprietor, or by his absence in a remote country: he has no friends, or they are unwilling to interpose. It is natural, in this case, to apply for public authority. A court of common law, confined within certain precise limits, can give no aid; and therefore it is necessary that a court of equity should undertake cases of this kind; and the preventive remedy is easy, by naming an administrator, or, as termed in the Roman law, *curator bonorum*. A similar example is, where a court of equity gives authority to sell the land of one under age, where the sale is necessary for payment of debt: to decline interposing, would be ruinous to the proprietor; for without authority of the court no man will venture to purchase from one under age. Here the motive is humanity to a single individual: but it would be an imperfection

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perfection in law, to abandon an innocent person to ruin, when the remedy is so easy. In the cases governed by the motive of public utility, a court of equity interposes as a court properly, giving or denying action, in order to answer the end purposed: but in the cases now mentioned, and in others similar, there is seldom occasion for a process; the court acts by magisterial powers.

The powers above set forth assumed by our courts of equity, are, in effect, the same that were assumed by the Roman Prætor, from necessity, without any express authority. “Jus prætorium est. “quod prætores introduxerunt, adjuvan- “di vel supplendi vel corrigendi juris Ci- “vilis gratia, propter utilitatem publi- “cam \*.”

Having given a historical view of a court of equity, from its origin to its present extent of power and jurisdiction, I proceed to some other matters, which must be premised before entering into particulars. The first I shall insist on is of the greatest moment, namely, Whether a court of

\* l. 7. §. 1. De justitia et jure.

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equity be, or ought to be, governed by any general rules? To determine every particular case according to what is just, equal, and salutary, taking in all circumstances, is undoubtedly the idea of a court of equity in its perfection; and had we angels for judges, such would be their method of proceeding, without regarding any rules: but men are liable to prejudice and error, and for that reason cannot safely be trusted with unlimited powers. Hence the necessity of establishing rules, to preserve uniformity of judgement in matters of equity as well as of common law: the necessity is perhaps greater in the former, because of the variety and intricacy of equitable circumstances. Thus, though a particular case may require the interposition of equity to correct a wrong or supply a defect; yet the judge ought not to interpose, unless he can found his decree upon some rule that is equally applicable to all cases of the kind. If he be under no limitation, his decrees will appear arbitrary, though substantially just: and, which is worse, will often be arbitrary, and substantially unjust; for such too frequently are human proceedings when

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when subjected to no control. General rules, it is true, must often produce decrees that are materially unjust; for no rule can be equally just in its application to a whole class of cases that are far from being the same in every circumstance: but this inconvenience must be tolerated, to avoid a greater, that of making judges arbitrary. A court of equity is a happy invention to remedy the errors of common law: but this remedy must stop somewhere; for courts cannot be established without end, to be checks one upon another. And hence it is, that, in the nature of things, there cannot be any other check upon a court of equity but general rules. Bacon expresses himself upon this subject with his usual elegance and perspicuity: “ Non  
 “ sine causa in usum venerat apud Roma-  
 “ nos album prætoris, in quo præscripsit  
 “ et publicavit quomodo ipse jus dicturus  
 “ esset. Quo exemplo iudices in curiis  
 “ prætoriiis, regulas sibi certas (quantum  
 “ fieri potest) proponere, easque publice  
 “ affigere, debent. Etenim optima est  
 “ lex, quæ minimum relinquit arbitrio  
 “ iudicis,



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“judicis, optimus judex qui minimum  
“fibi \*.”

In perusing the following treatise, it will be discovered, that the connections regarded by a court of equity seldom arise from personal circumstances, such as birth, resemblance of condition, or even blood, but generally from subjects that in common language are denominated *goods*. Why should a court, actuated by the spirit of refined justice, overlook more substantial ties, to apply itself solely to the grosser connections of interest? doth any connection founded on property make an impression equally strong with that of friendship, or blood-relation, or of country? doth not the law of nature form duties on the latter, more binding in conscience than on the former? Yet the more conscientious duties are left commonly to shift for themselves, while the duties founded on interest are supported and enforced by courts of equity. This, at first view, looks like a prevailing attachment to riches; but it is not so in reality. The duties arising from the connection last

\* De aug. scient. l. 8. cap. 3. aph. 46.

mentioned,

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mentioned, are commonly ascertained and circumscribed, so as to be susceptible of a general rule to govern all cases of the kind. This is seldom the case of the other natural duties; which, for that reason, must be left upon conscience, without receiving any aid from a court of equity. There are, for example, not many duties more firmly rooted in our nature than that of charity; and, upon that account, a court of equity will naturally be tempted to interpose in its behalf. But the extent of this duty depends on such a variety of circumstances, that the wisest heads would in vain labour to bring it under general rules: to trust, therefore, with any court, a power to direct the charity of individuals, is a remedy which to society would be more hurtful than the disease; for instead of enforcing this duty in any regular manner, it would open a wide door to legal tyranny and oppression. Viewing the matter in this light, it will appear, that such duties are left upon conscience, not from neglect or insensibility, but from the difficulty of a proper remedy. And when such duties can be brought under a general rule, I except not even gratitude,

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titude, though in the main little-susceptible of circumscription, we shall see afterward, that a court of equity declines not to interpose.

In this work will be found several instances where equity and utility are in opposition; and when that happens, the question is, Which of them ought to prevail? Equity, when it regards the interest of a few individuals only, ought to yield to utility when it regards the whole society. It is for that very reason, that a court of equity is bound to form its decrees upon general rules; for this measure regards the whole society by preventing arbitrary proceedings.

It is commonly observed, that equitable rights are less steady and permanent than those of common law: the reason will appear from what follows. A right is permanent or fluctuating according to the circumstances upon which it is founded. The circumstances that found a right at common law, being always few and weighty, are not variable: a bond of borrowed money, for example, must subsist till it be paid. A claim in equity, on the contrary, seldom arises without a multiplicity

city of circumstances; which make it less permanent, for if but a single circumstance be withdrawn, the claim is gone. Suppose, for example, that an investment of annual rent is assigned to a creditor for his security: the creditor ought to draw his payment out of the interest before touching the capital; which is an equitable rule, because it is favourable to the assignor or cedent, without hurting the assignee. But if the cedent have another creditor who arrests the interest, the equitable rule now mentioned ceases, and gives place to another; which is, that the assignee ought to draw his payment out of the capital, leaving the interest to be drawn by the arrester. Let us next suppose, that the cedent hath a third creditor, who after the arrestment adjudges the capital. This new circumstance varies again the rule of equity: for though the cedent's interest weighs not in opposition to that of his creditor arresting, the adjudging creditor and the arrester are upon a level as to every equitable consideration; and upon that account, the assignee, who is the preferable creditor, ought to deal impartially between them: if he be not willing to take pay-



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ment out of both subjects proportionally, but only out of the capital, or out of the interest; he ought to make an assignment to the postponed creditor, in order to redress the inequality; and if he refuse to do this act of justice, a court of equity will interpose.

This example shows the mutability of equitable claims: but there is a cause which makes them appear still more mutable than they are in reality. The strongest notion is entertained of the stability of a right of property; because no man can be deprived of his property but by his own deed. A claim of debt is understood to be stable, but in an inferior degree; because payment puts an end to it without the will of the creditor. But equitable rights, which commonly accrue to a man without any deed of his, are often lost in the same manner: and they will naturally be deemed transitory and fluctuating, when they depend so little on the will of the persons who are possessed of them.

In England, where the courts of equity and common law are different, the boundary between equity and common law, where the legislature doth not interpose,

pose, will remain always the same. But in Scotland, and other countries where equity and common law are united in one court, the boundary varies imperceptibly; for what originally is a rule in equity, loses its character when it is fully established in practice; and then it is considered as common law: thus the *actio negotiorum gestorum*, retention, salvage, &c. are in Scotland scarce now considered as depending on principles of equity. But by cultivation of society, and practice of law, nicer and nicer cases in equity being daily unfolded, our notions of equity are preserved alive; and the additions made to that fund, supply what is withdrawn from it by common law.

What is now said suggests a question, no less intricate than important, Whether common law and equity ought to be committed to the same or to different courts. The profound Bacon gives his opinion in the following words: “ Apud nonnullos  
 “ receptum est, ut jurisdictio, quæ deter-  
 “ nit secundum æquum et bonum, atque  
 “ illa altera, quæ procedit secundum jus  
 “ strictum, iisdem curiis deputentur: a-  
 “ pud alios autem, ut diversis: omnino  
 D 2 “ placet

“ placet curiarum separatio. Neque enim  
 “ fervabitur distinctio casuum, si fiat com-  
 “ mixtio jurisdictionum : sed arbitrium  
 “ legem tandem trahet \*.” Of all ques-  
 tions those which concern the constitution  
 of a state, and its political interest, being  
 the most involved in circumstances, are  
 the most difficult to be brought under pre-  
 cise rules. I pretend not to deliver any  
 opinion; and feeling in myself a bias a-  
 gainst the great authority mentioned, I  
 scarce venture to form an opinion. It may  
 be not improper, however, to hazard a  
 few observations, preparatory to a more  
 accurate discussion. I feel the weight of  
 the argument urged in the passage above  
 quoted. In the science of jurisprudence,  
 it is undoubtedly of great importance, that  
 the boundary between equity and com-  
 mon law be clearly ascertained; without  
 which we shall in vain hope for just deci-  
 sions : a judge, who is uncertain whether  
 the case belong to equity or to common  
 law, cannot have a clear conception what  
 judgement ought to be pronounced. But  
 a court that judges of both, being relie-

\* De aug. scient. l. 8. cap. 3. aph. 45.

ved from determining this preliminary point, will be apt to lose sight altogether of the distinction between common law and equity. On the other hand, may it not be urged, that the dividing among different courts things intimately connected, bears hard upon every one who has a claim to prosecute? Before bringing his action, he must at his peril determine an extreme nice point, Whether the case be governed by common law, or by equity. An error in that preliminary point, though not fatal to the cause because a remedy is provided, is, however, productive of much trouble and expence. Nor is the most profound knowledge of law sufficient always to prevent this evil; because it cannot always be foreseen what plea will be put in for the defendant, whether a plea in equity or at common law. In the next place, to us in Scotland it appears extremely uncouth, that a court should be so constituted, as to be tied down in many instances to pronounce an iniquitous judgement. This not only happens frequently with respect to covenants, as above mentioned, but will always happen where a claim founded on common law, which  
must



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must be brought before a court of common law, is opposed by an equitable defence, which cannot be regarded by such a court. Weighing these different arguments with some attention, the preponderancy seems to be on the side of an united jurisdiction; so far at least, as that the court before which a claim is regularly brought, should be empowered to judge of every defence that is laid against it. The sole inconvenience of an united jurisdiction, that it tends to blend common law with equity, may admit a remedy, by an institute distinguishing with accuracy their boundaries: but the inconvenience of a divided jurisdiction admits not any effectual remedy. These hints are suggested with the greatest diffidence; for I cannot be ignorant of the bias that naturally is produced by custom and established practice.

In Scotland, as well as in other civilized countries, the King's council was originally the only court that had power to remedy defects or redress injustice in common law. To this extraordinary power the court of session naturally succeeded, as being

ing the supreme court in civil matters; for in every well-regulated society, some one court must be trusted with this power, and no court more properly than that which is supreme. It may at first sight appear surprising, that no mention is made of this extraordinary power in any of the regulations concerning the court of session. It is probable, that this power was not intended, nor early thought of; and that it was introduced by necessity. That the court itself had at first no notion of being possessed of this power, is evident from the act of federunt November 27. 1592, declaring, " That in time coming they will judge and decide upon clauses irritant contained in contracts, tacks, infeftments, bonds, and obligations, precisely according to the words and meaning of the same;" which in effect was declaring themselves a court of common law, not of equity. But the mistake was discovered: the act of federunt wore out of use; and now for more than a century, the court of session hath acted as a court of equity, as well as of common law. Nor is it rare to find powers unfolded in practice, that were not in view at the institution

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tion of a court. When the Roman Pretor was created to be the supreme judge, in place of the consuls, there is no appearance that any instructions were given him concerning matters of equity. And even as to the English court of chancery, though originally a court of equity, there was not at first the least notion entertained of that extensive jurisdiction to which in later times it hath justly arrived.

In Scotland, the union of common law with equity in the supreme court, appears to have had an influence upon inferior courts, and to have regulated their powers with respect to equity. The rule in general is, That inferior courts are confined to common law: and hence it is that an action founded merely upon equity, such as a reduction upon minority and lesion, upon fraud, &c. is not competent before an inferior court. But if against a process founded on common law an equitable defence be stated, it is the practice of inferior courts to judge of such defence. Imitation of the supreme court, which judges both of law and equity, and the inconvenience of removing to another court a process that has perhaps long depended, paved the way

way to this enlargement of power. Another thing already taken notice of, tends to enlarge the powers of our inferior courts more and more; which is, that many actions, founded originally on equity, have by long practice obtained an establishment so firm as to be reckoned branches of the common law. This is the case of the *actio negotiorum gestorum*, of recompence, and many others, which, for that reason, are now commonly sustained in inferior courts.

Our courts of equity have advanced far in seconding the laws of nature, but have not perfected their course. Every clear and palpable duty is countenanced with an action; but many of the more refined duties, as will be seen afterward, are left still without remedy. Until men, thoroughly humanized, be generally agreed about these more refined duties, it is perhaps the more prudent measure for a court of equity to leave them upon conscience. Neither doth this court profess to take under its protection every covenant and agreement. Many engagements of various sorts, the fruits of idleness, are too trifling, or too ludicrous, to merit the countenance of



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law: a court, whether of common law or of equity, cannot preserve its dignity if it descend to such matters. Wagers of all sorts, whether upon horses, cocks, or accidental events, are of this sort. People may amuse themselves, and men of easy fortunes may pass their whole time in that manner, because there is no law against it; but pastime, contrary to its nature, ought not to be converted into a serious matter, by bringing the fruits of it into a court of justice. This doctrine seems not to have been thoroughly understood, when the court of session, in a case reported by Dirleton, sustained action upon what is called there a *sponsio ludicra*. A man having taken a piece of gold, under condition to pay back a greater sum in case he should be ever married, was after his marriage sued for performance. The court sustained process; though several of the judges were of opinion, that *sponsiones ludicre* ought not to be authorized \*. But in the following remarkable case, the court judged better. In the year 1698, a bond was executed of the follow-

\* February 9. 1676.

ing tenor. " I Mr William Cochran of  
 " Kilmaronock, for a certain sum of mo-  
 " ney delivered to me by Mr John  
 " Stewart younger of Blackhall, bind and  
 " oblige me, my heirs and successors, to  
 " deliver to the said Mr John Stewart, his  
 " heirs, executors, and assignees, the sum  
 " of one hundred guineas in gold, and  
 " that so soon as I, or the heirs descend-  
 " ing of my body, shall succeed to the  
 " dignity and estate of Dundonald." This  
 sum being claimed from the heir of the  
 obligor, now Earl of Dundonald, it was  
 objected, That this being a *sponsio ludicra*  
 ought not to be countenanced with an ac-  
 tion. It was answered, That bargains like  
 the present are not against law; for if  
 purchasing the hope of succession from a  
 remote heir be lawful \*, it cannot be un-  
 lawful to give him a sum on condition of  
 receiving a greater when he shall succeed.  
 If an heir pinched for money procure it  
 upon disadvantageous terms, equity will  
 relieve him: but in the present case there  
 is no evidence, nor indeed suspicion, of  
 inequality. It was replied, That it tends

\* See Fountainhall, July 29. 1708, Rag *contra* Brown.

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not to the good of society to sustain action upon such bargains : they do not advance commerce, nor contribute in any degree to the comforts of life ; why then should a court be bound to support them ? It is sufficient that they are not reprobated, but left upon conscience and private faith. The court refused to sustain action ; reserving it to be considered, whether the pursuer, upon proving the extent of the sum given by him, be not intitled to demand it back \*.

The multiplied combinations of individuals in society, suggest rules of equity so numerous and various, that in vain would any writer think of collecting all of them. From an undertaking which is in a good measure new, all that can be expected is a collection of some of the capital cases that occur the most frequently in law-proceedings. This collection will comprehend many rules of equity, some of them probably of the most extensive application. Nor will it be without profit, even as to subjects omitted ; for by diligently observing the application of e-

\* Feb. 7. 1753, Sir Michael Stewart of Blackhall *contra* Earl of Dundonald.

quitable

quitable principles to a number of leading cases, a habit is gradually formed of reasoning correctly upon matters of equity, which will enable us to apply the same principles to new cases as they occur.

Having thus given a general view of my subject, I shall finish with explaining my motive for appearing in print. Practising lawyers, to whom the subject must already be familiar, require no instruction. This treatise is dedicated to the studious in general, such as are fond to improve their minds by every exercise of the rational faculties. Writers upon law are too much confined in their views : their works, calculated for lawyers only, are involved in a cloud of obscure words and terms of art, a language perfectly unknown except to those of the profession. Thus it happens, that the knowledge of law, like the hidden mysteries of some Pagan deity, is confined to its votaries ; as if others were in duty bound to blind and implicit submission. But such superstition, whatever unhappy progress it may have made in religion, never can prevail in law : men who have life or fortune at stake, take the liberty to think for themselves ;



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selves; and are no less ready to accuse judges for legal oppression, than others for private violence or wrong. Ignorance of law hath in this respect a most unhappy effect: we all regard with partiality our own interest; and it requires knowledge no less than candour, to resist the thought of being treated unjustly when a court pronounceth against us. Thus peevishness and discontent arise, and are vented against the judges of the land. This, in a free government, is a dangerous and infectious spirit, to remedy which we cannot be too solicitous. Knowledge of those rational principles upon which law is founded I venture to suggest, as a remedy no less efficacious than palatable. Were such knowledge universally spread, judges who adhere to rational principles, and who with superior understanding can reconcile law to common sense, would be revered by the whole society. The fame of their integrity, supported by men of parts and reading, would descend to the lowest of the people; a thing devoutly to be wished! Nothing tends more to sweeten the temper, than a conviction of impartiality in judges; by which we hold ourselves secure

cure against every insult or wrong. By that means, peace and concord in society are promoted; and individuals are finely disciplined to submit with the like deference to all other acts of legal authority. Integrity is not the only duty required in a judge: to behave so as to make every one rely upon his integrity, is a duty no less essential. Deeply impressed with these notions, I dedicate my work to every lover of science; having endeavoured to explain the subject in a manner that requires in the reader no particular knowledge of municipal law. In that view I have avoided terms of art; not indeed with a scrupulous nicety, which might look like affectation; but so as that with the help of a law-dictionary, what I say may easily be apprehended.

ORDER, a beauty in every composition, is essential in a treatise of equity, which comprehends an endless variety of matter. To avoid obscurity and confusion, we must, with the strictest accuracy, bring under one view things intimately connected, and handle separately things unconnected, or but slightly connected. Two  
I
great

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great principles, justice and utility, govern the proceedings of a court of equity; and every matter that belongs to that court, is regulated by one or other of these principles. Hence a division of the present work into two books, the first appropriated to justice, the second to utility; in which I have endeavoured to ascertain all the principles of equity that occurred to me. I thought it would benefit the reader to have these principles illustrated in a third book, where certain important subjects are selected to be regularly discussed from beginning to end; such as furnish the most frequent opportunities for applying the principles ascertained in the former part of the work.

PRIN-

P R I N C I P L E S  
O F  
E Q U I T Y.

B O O K I.

Powers of a Court of Equity derived from the Principle of Justice.

**I**N the Introduction occasion was taken to show, that a court of equity is necessary, first, to supply the defects of common law, and, next, to correct its rigour or injustice. The necessity in the former case arises from a principle, That where there is a right, it ought to be made effectual; in the latter, from another principle,

VOL. I. F ciple,



ciple, That for every wrong there ought to be a remedy. In both, the object commonly is pecuniary interest. But there is a legal interest which is not pecuniary; and which, for the sake of perspicuity, ought to be handled separately. In that view, the present book is divided into two parts. In the first are treated, the powers of a court of equity to supply defects and to correct injustice in the common law, with respect to pecuniary interest; and in the second, the powers of a court of equity with respect to matters of justice that are not pecuniary.

## P A R T I.

Powers of a court of equity to remedy the imperfections of common law with respect to pecuniary interest, by supplying what is defective, and correcting what is wrong.

**T**HE imperfections of common law are so many and so various, that it will be difficult to bring them into any perfect order.

order. The following arrangement, if not the best, seems at least to be natural and easy. 1. Imperfections of common law in protecting men from being harmed by others. 2. In protecting the weak of mind from harming themselves. 3. Imperfections of common law with respect to the natural duty of benevolence. 4. Imperfections with respect to deeds and covenants. 5. With respect to statutes. 6. With respect to transactions between debtor and creditor. 7. With respect to actions at law. 8. With respect to legal execution. 9. Power of a court of equity to inflict punishment.

## CHAPTER I.

Powers of a court of equity to remedy what is imperfect in common law, with respecting to the protecting individuals from harm.

THE social state, however desirable, could never have taken place among men, were they not restrained from injuring

ring those of their own species. To abstain from injuring others, is accordingly the primary law of society, enforced by the most vigorous sanctions: every culpable transgression of that law, subjects the wrong-doer to reparation; and every intentional transgression, subjects him also to punishment.

The moral principle of abstaining from injuring others, naturally takes the lead in every institute of law; and as the enforcing that principle was a capital object in establishing courts of justice, it is proper to commence a treatise of equity with examining in what cases the interposition of a court of equity is required to make it effectual; which can only be where no remedy is provided at common law.

With respect to harm done intentionally, there is no imperfection in common law, and consequently no necessity for a court of equity. But that court may be necessary in the following cases. First, Harm done by one in exercising a right or privilege. Second, Harm done by one who has it not in view to exercise any right or privilege. Third, A man tempted or overawed by undue influence to act knowingly

knowingly against his interest. Fourth, A man moved to act unknowingly against his interest, by fraud, deceit, or other artificial means. I close the chapter with the remedies that are applied by a court of equity against the wrongs above stated. Of these in their order.

## SECTION I.

*Harm done by a man in exercising a right or privilege.*

THE social state, which on the one hand is highly beneficial by affording mutual aid and support, is on the other attended with some inconveniencies, as where a man cannot have the free exercise of a right or privilege without harming others. How far such exercise is authorized by the law of our nature, is a question of nice discussion. That men are born in a state of freedom and independence, is an established truth; but whether that freedom and independence may not admit of some limitation from the collision of opposite rights and privileges, deserves to be examined. If the free exercise of my right  
be



be indulged me without regarding the harm that may ensue to another, that other is so far under my power, and his interest so far subjected to mine. On the other side, if I be restrained from the exercise of my right in every case where harm may ensue to another, I am so far dependent upon that other, and my interest so far subjected to his. Here is a threatening appearance for civil society, that seems to admit no resource but force and violence. Cases there certainly are that admit no other resource; as where in a shipwreck two persons lay hold of the same plank, one of whom must be thrust off, otherwise both will go to the bottom. But upon the present supposition, we are not reduced to that deplorable dilemma; for nature has temper'd these opposite interests by a rule no less beautiful than salutary. This rule consists of two branches: the first is, That the exercising my right will not justify me in doing any action that directly harms another; and so far my interest yields to his: the second is, That in exercising my right I am not answerable for any indirect or consequential damage that another may suffer; and so far the  
interest

interest of others yields to mine: I am sorry if my neighbour happen thus to suffer; but I feel no check of conscience on that account. The first branch resolves into a principle of morality, That no interest of mine, not even the preservation of life itself, authorises me to do any mischief to an innocent person \*. The other branch is founded on expediency in opposition to justice; for if the possibility of harming others, whether foreseen or not foreseen, were sufficient to restrain me from prosecuting my own rights and privileges, men would be too much cramped in action, or rather would be reduced to a state of absolute inactivity †.

This rule, which is far from being easy in its application, requires much illustration. I begin with the first branch. However profitable it may be to purge my field of water, yet it is universally admitted, that I cannot legally open a new passage for it into my neighbour's ground; because this is a direct damage to him: "Sic enim debere quem meliorem agrum

\* Sketches of the History of Man, vol. 4. p. 31. 32.

† Eod. p. 64. 65.

" suum

“*suum facere, ne vicini deteriorem faciat* \*.” Where a river is interjected between my property and that of my neighbour, it is not lawful for me to alter its natural course, whether by throwing it upon my neighbour’s ground, or by depriving him of it; because these acts, both of them, are direct encroachments upon his property. Neratius puts the case of a lake which in a rainy season overflows the neighbouring fields, to prevent which on one side, a bulwark is erected. He is of opinion, that if this bulwark have the effect, in a rainy season, to throw a greater quantity of water than usual upon the opposite fields, it ought to be demolished †. As the damage here is only occasional or accidental, this opinion is not well founded. It has not even a plausible appearance. Is it not natural and common for a proprietor to fence his bank, in order to prevent the encroachments of a river or of a lake? The course of the river is not altered; and the proprietor on the opposite side may fence his bank, if he be afraid of encroachments.

\* *De aqua, et aquæ pluv. l. 1. § 4.*

† *De aqua, et aquæ pluv. l. 1. § 2.*

The foregoing examples, being all of the same kind, are governed by a practical rule, That we must not throw any thing into our neighbour's ground; *Ne immittas in alienum*, as expressed in the Roman law.

But the principle of abstaining to hurt others regards persons as well as property.

"It seems the better opinion, that a brew-

"house, glass-house, chandler's shop, or

"stie for swine, set up in such inconve-

"nient parts of a town that they cannot

"but greatly incommode the neighbour-

"hood, are common nuisances\*." Neigh-

bours in a town must submit to inconve-

niences from each other; but they must

be protected from extraordinary disturb-

ances that render life uncomfortable. Up-

on the same ground the court of session

was of opinion, that the working in the

upper story of a large tenement with

weighty hammers upon an anvil, is a nui-

sance; and it was decreed that the black-

smith should remove at the next term †.

As to the second branch of the rule, it

\* A new abridgement of the law, vol. 3. p. 686.

† Kinloch of Gilmerton against Robertson, Dec. 9. 1756.



is agreed by all, as above mentioned, that where a river gradually encroaches on my property, I may fence my bank in order to prevent further encroachments; for this work does not tend to produce even indirect or consequential damage: all the effect it can have is, to prevent my neighbour from gaining ground on his side.

In matters of common property, the application of this second branch is sometimes more intricate. A river or any running stream directs its course through the land of many proprietors; who are thereby connected by a common interest, being equally intitled to the water for useful purposes. Whence it follows, that the course of the river or running stream cannot be diverted by any one of the proprietors, so as to deprive others of it. Where there is plenty for all, there can be no interference: but many streams are so scanty, as to be exhausted by using the water too freely, leaving little or none to others. In such a case, there ought to be a rule for using it with discretion; though hitherto no rule has been laid down. To supply the defect in some measure, I venture to suggest the following particulars, which practice  
may

may in time ripen to a precise rule. It will be granted me, that if there be not a sufficiency of water for every purpose, those purposes ought to be preferred that are the most essential to the well-being of the adjacent proprietors. The most essential use is drink for man and beast; because they cannot subsist without it. What is next essential, is water for washing; because cleanness contributes greatly to health. The third is water for a corn-mill, which saves labour, and cheapens bread. The fourth is watering land for enriching it. The fifth is water for a bleachfield. And the lowest I shall mention, is water for machinery, necessary for cheapening the productions of several arts. There may be more divisions; but these are sufficient in a general view. From this arrangement it follows, that one may use the water of a rivulet for drink, and for brewing and baking, however little be left to the inferior heritors. But a proprietor cannot be deprived of that essential use by one above him, who wants to divert the water for a mill, for a bleachfield, or for watering his land. Nor can a proprietor divert the water for a bleachfield, or for

watering his land, unless he leave sufficient for a mill below. According to this doctrine, I may lawfully dig a pit in my own field for gathering water to my cattle, though it happens to intercept a spring that run under ground into my neighbour's field, and furnished him with water \*.

Under this head comes a question that may be resolved by the principles above laid down, which is, How far the free use of a river in carrying goods can be prevented or impeded by a cruive for catching salmon. It is admitted, that a navigable river fit for sailing, ought to be free to all for the purposes of commerce; and that the navigation ought not to be hurt, or rendered difficult, by any work erected in the channel of the river. But supposing a river that can only admit the floating of timber, is it lawful to erect there a cruive with a dam-dike, so as to prevent that operation? A cruive for catching salmon is an extraordinary privilege, granted to a single proprietor, prejudicial to all above who have right to fish salmon. The floating of timber, on the contrary,

\* L. I. § 12. De aqua.

is profitable to the proprietor, and to every person who stands in need of that commodity. A cruive, therefore, ought to yield to the floating of timber, as far as these rights are incompatible. But will positive prescription give no aid to the proprietor of a cruive in this case? This prescription regulates the competition among those who pretend right to the same subject; but protects not the possessor from burdens naturally affecting his property. Now it is a rule, That property, which is a private right, must yield to what is essential for the good of the nation. In order to defend a town besieged, a house standing in the way ought to be demolished. The right of property will not avail in this case, even admitting the proprietor and his predecessors to have been in possession for a century. Or suppose, that to repel a foreign enemy, my field is found to be an advantageous situation for the national troops, it is lawful to encamp upon it, though the consequence be to destroy the trees, and all it produces. Or, to come nearer the present case, a manufacturing village is erected on the brink of a rivulet, which is used for a mill below that



that has been in constant exercise forty years and upward. The manufactures succeed, and the village becomes so populous as nearly to exhaust the water in drink for man and beast, in brewing, and in other purposes preferable to that of a mill. Yet I take it for granted, that positive prescription will not protect the proprietor of the mill; because here there is no competition, but only property subjected to the burdens that naturally attend it. The transition from this example to the case in hand is direct. The possession of a cruive for a hundred years, will not bar a superior heritor from planting trees, nor consequently from floating them down the river for sale; for evidently positive prescription can have no operation in this case. It can have no effect but to bestow upon the possessor the property of the cruive, which otherwise might have been doubtful. But such property must, like all other property, be subjected to its natural burdens; and cannot stand in the way of a right of greater importance to the public.

It is lawful for me to build a house upon my march, though it intercept the light from  
from

from a neighbouring house ; for this is consequential damage only : beside, that if my neighbour chuse to build on his march, he must see that I am equally intitled.

With regard to this section in general, there is a limitation founded entirely upon equity ; which is, That though a man may lawfully exercise his right for his own benefit where the harm that ensues is only consequential ; yet that the exercise is unlawful if done intentionally to distress others, without any view of benefiting himself. Rights and privileges are bestowed on us for our own good, not for hurting others. Malevolence is condemned by all laws, natural and municipal : a malevolent act of the kind mentioned is condemned by the actor himself in his sedate moments ; and he finds himself in conscience bound to repair the mischief he has thus done. The common law, it is true, overlooks intention, considering the act in no other view but as legal exercise of a right. But equity holds intention to be the capital part, being that which determines an action to be right or wrong ; and affords reparation accordingly. Hence a general rule in equity,

quity, That justice will not permit a man to exercise his right where his intention is solely to hurt another ; which in law-language is termed the acting *in emulationem vicini*. In all cases of this nature, a court of equity will give redress by voiding the act, if that can be done ; otherwise by awarding a sum in name of damages. We proceed to examples.

A man may lawfully dig a pit in his own field in order to intercept a vein of water that runs below the surface into his neighbour's property, provided his purpose be to have water for his own use ; but if his purpose be to hurt his neighbour without any view to benefit himself, the act is unlawful, as proceeding from a malevolent intention ; and a court of equity will restrain him from this operation \*.

Upon the same principle is founded the noted practice in a court of equity, of refusing to sustain an action at law unless the plaintiff can show an interest ; for if he can take no benefit by the action, the presumption must be, that it is calculated

\* De aqua, et aquæ pluv. l. 1. § 12.

to distress the defendant, and done *in emulationem vicini*.

In order to establish the *jus crediti* in an assignee, and totally to divest the cedent or assignor, the law of Scotland requires, that notification of the assignment be made to the debtor; verified by an instrument under the hand of a notary, termed an *intimation*. Before intimation the legal right is in the cedent, and the assignee has a claim in equity only. In this case, payment made to the cedent by the debtor ignorant of the assignment, is in all respects the same as if there were no assignment: it is payment made to the creditor, which in law must extinguish the debt. But what if the debtor, when he makes payment to the cedent before intimation, be in the knowledge of the assignment? The common law knows no creditor but him who is legally vested in the right; and therefore, disregarding the debtor's knowledge of the assignment, it will sustain the payment made to the cedent as made to the legal creditor. But equity teaches a different doctrine. It was wrong in the cedent to take payment after he convey'd his right to the assignee; and



though the debtor was only exercising his own right in making payment to the cedent, who is still the creditor; yet being in the knowledge of the assignment, the payment must have been made intentionally to distress the assignee, without benefiting himself. A court of equity, therefore, correcting what is imperfect in common law, will oblige the debtor to make payment over again to the assignee, as reparation of the wrong done him.

With respect to this matter, there is a wide difference between the solemnities that may be requisite for vesting in an assignee a complete right to the subject, and what are sufficient to bar the debtor from making payment to the cedent. In the former view, a regular intimation is necessary, or some solemn act equivalent to a regular intimation, a process for example. In the latter view, the private knowledge of the debtor is sufficient; and hence it is, that a promise of payment made to the assignee, though not equivalent to a regular intimation, is however sufficient to bar the debtor from making payment to the cedent. The court went farther: they were of opinion, that the assignee  
having

having shown his assignment to the debtor, though without intimating the same by a notary, the debtor could not make payment to the cedent \*. But historical knowledge of an assignment, where it falls short of ocular evidence, will scarce be sustained to put the debtor *in mala fide*. And this rule is founded on utility: a debtor ought not to be furnished with pretexts against payment; and if private conviction of an assignment, without certain knowledge, were sufficient, private conviction would often be affected, to gain time, and to delay payment.

## S E C T. II.

*Harm done by one who has it not in view to exercise any right or privilege.*

IN tracing the history of courts of law with respect to this branch, one beforehand would conjecture, that common law should regard no acts injuring others in

\* Fountainhall, February 16. 1703, Leith contra Garden.

their rights and privileges, but where mischief is intended; neglecting acts that are culpable only, as having a foundation too slight for that law. But upon examination we discover a very different plan; so different as that damage occasioned even by the slightest fault is, and always was, repaired in courts of common law. In the criminal law, very little distinction was originally made between a criminal and a culpable act, even with respect to punishment\*, not to talk of reparation: the passion of resentment, in a fierce and lawless people, is roused by the slightest harm; and is too violent for any deliberate distinction between intentional and culpable wrong. In fact, both were equally subjected to punishment, even after the power of punishment was transferred to the magistrate. Of this we have a notable example in the *lex Aquilia* among the Romans: “Qui servum alienum, quadrupedem vel pecudem, injuria occiderit; quanti id in eo anno plurimi fuit, tantum æs dare domino damnas esto†.” Here the word *injuria* is interpreted, “quod

\* Historical law-tracts, tract 1.

† l. 2. p. ad leg. Aquil.

“ non

“ non jure factum est ; i. e. si culpa quis occiderit \*.” The retrospect here may happen to be a great punishment ; for the obliging a man who kills a lame horse not worth fifty shillings, to pay fifty pounds because the horse was of that value some months before, is evidently a punishment. And as even a *culpa levissima* subjects a man to the *lex Aquilia* †, it is clear, that the slightest fault by which damage ensues is punishable by that law. The *lex Aquilia* was accordingly held by all to be penal ; and for that reason no action upon it was sustained against the heir ‡. The only thing surprising is, to find this law continuing in force, without alteration or improvement, down to the reign of the Emperor Justinian. The Roman law was cultivated by men of great talents, and was celebrated all the world over for its equitable decisions : is it not amazing, that in an enlightened age such gross injustice should prevail, as to make even the slightest fault a ground for punishment ?

When such was the common law of the Romans with regard to punishment, there

\* l. 5. § 1. ad leg. Aquil.

† l. 44. eod.

‡ l. 23. § 8. ad leg. Aquil.



can be no difficulty to assign a reason, why that law was extended to reparation even for the slightest fault ; and as little, to assign a reason why the same obtains in the common law of most European nations, the principles of which are borrowed from the Roman law. The penal branch, it is true, of wrongs that are culpable only, not criminal, has been long abolished ; having given way to the gradual improvement of the moral sense, which dictates, that where there is no intention to do mischief, there ought to be no punishment ; and that the person who is hurt by a fault only, not by a crime, cannot justly demand more than reparation. And as this is the present practice of all civilized nations, it is clear, that the reparation of damage occasioned by acts of violence comes under courts of common law, which consequently is so far a bar to a court of equity.

And considering, that regulations restraining individuals from injuring others and compelling them to perform their engagements, composed originally the bulk of common law \*, it will not be surprising,

\* See Introduction.

that

that courts of common law took early under their cognisance every culpable act that occasions mischief; which was the more necessary, in respect that, punishment being laid aside, reparation is the only mean left for repressing a culpable act. Thus we find ample provision made by common law, not only against intentional mischief, but also against mischief that is only foreseen, not intended. And so far there is no occasion for a court of equity.

But for the security of individuals in society, it is not sufficient that a man himself be prohibited from doing mischief: he ought over and above to be careful and vigilant, that persons, animals, and things, under his power, do no mischief; and if he neglect this branch of his duty, he is liable to repair the mischief that ensues, equally as if it had proceeded from his own act. With respect to servants, it is the master's business to make a right choice, and to keep them under proper discipline; and therefore, if they do any mischief that might have been foreseen and prevented, he is liable. Thus, if a passenger be hurt by my servant's throwing a stone out of a window

window in my house, or have his cloaths sullied by dirty water poured down upon him, the damage must be repaired by me at the first instance; reserving to me relief against my servant. But if a man be killed or wounded by my servant in a scuffle, I am not liable; unless it can be specified, that I knew him to be quarrelsome, and consequently might have foreseen the mischief. With respect to animals, it is the proprietor's duty to keep them from doing harm; and if harm ensue that might have been foreseen, he is bound to repair it; as, for example, where he suffers his cattle to pasture in his neighbour's field; or where the mischief is done by a beast of a vicious kind; or even by an ox or a horse, which, contrary to its nature, he knows to be mischievous \*. As to things, it is also the duty of the proprietor to keep them from doing harm. Thus both fiar and liferenter were made liable to repair the hurt occasioned to a neighbouring tenement by the fall of their house †. It is the duty of a man who carries stones in a waggon a-

\* Exodus, chap. xxi. 29. 36.

† Stair, 16th February 1666, Kay contra Littlejohn.

long the highway, to pack them so as to prevent harm; and if by careless package a stone drop out and bruise a passenger, the man is liable. But as to cases of this kind, it is a good defence against a claim of reparation, that the claimant suffered by his own fault: "*Si quis aliquem evitans, magistratum forte, in taberna proxima se immisisset, ibique a cane feroce læsus esset, non posse agi canis nomine quidam putant: at si solutus fuisset, contra \**" If a fierce bull of mine get loose, and wound a person, I am liable; but if a man break down my fence, and is hurt by the bull in my inclosure, I am not liable; for by an unlawful act he himself was the occasion of the hurt he suffered.

Thus, with respect to matters falling under the present section, it appears, that faults come under common law as well as crimes, and omissions as well as commissions; and therefore so far the common law appears complete, leaving no gleanings to a court of equity.

\* 1. 2. § 1. Si quadrupes pauperiem fecisse dicatur.



## S E C T.     III.

*A man tempted or overawed by undue influence to act knowingly against his interest.*

THE imperfections of man are not confined to his corporeal part: he has weaknesses of mind as well as of body; and if the taking advantage of the latter to distress a person by acts of violence be a moral wrong, intitling the sufferer to reparation, it is no less so to take advantage of the former. Society could not subsist without such prohibition; and happy it is for man as a social being, that the prohibition with respect to both articles makes a branch of his nature.

For the sake of perspicuity, this section shall be split into two parts: the first, where a man, yielding to a temptation, acts knowingly against his interest: the next, where he is overawed to act knowingly against his interest.

ARTICLE

ARTICLE I. *Where a man, yielding to a temptation, acts knowingly against his interest.*

JEAN MACKIE, heiress of Maidland, having disposed several parcels of land, lying about the town of Wigton, to persons who were mostly innkeepers there, a reduction was brought upon the head of fraud and circumvention by her sister, next heir in virtue of a settlement. It came out upon proof, 1st, That Jean Mackie was a habitual drunkard; that she sold her very cloaths to purchase drink, scarce leaving herself a rag to cover her nakedness; and that, by tempting her with a few shillings, it was in the power of any one to make her accept a bill for a large sum, or to make her dispose any part of her land. 2dly, That the dispositions challenged were granted for no adequate cause. The court accordingly voided these dispositions \*. Upon this case it ought to be observed, that though fraud and circumvention were

\* November 24. 1752, Mackie contra Maxwell, &c.

specified as the foundation of this reduction, which is a common but slovenly practice in processes of that sort; yet there was not the least evidence, that Jean was imposed upon or circumvened in any manner. Nor was there any necessity for recurring to such artifice: a little drink, or a few shillings to purchase it, would have tempted her at any time, drunk or sober, to give away any of her subjects. And she herself, being called as a witness, deponed; that she granted these dispositions freely, knowing well what she did. Where then lies the ground of reduction? Plainly here: It is undoubtedly an immoral act, to take advantage of weak persons who are incapable to resist certain temptations, thereby to strip them of their goods. To justify such an act, the consent of the person injured is of no avail, more than the consent of a child. With respect to the end, it is no less pernicious than theft or robbery.

ART. II.

ART. II. *Where a man is overawed to act knowingly against his interest.*

If it be a moral wrong to tempt a weak man to act against his interest, extortion is a wrong still more flagrant, by its nearer approach to open violence. What therefore only remains upon this article, is to illustrate it by examples.

Every benefit taken indirectly by a creditor, for the granting of which no impulsive cause appears but the money lent, will be voided as extorted. Thus an assignment to a lease was voided, being granted of the same date with a bond of borrowed money, and acknowledged to have had no other cause\*. At the time of granting an heritable bond of corroboration, the debtor engaged by a separate writing, That in case he should have occasion to sell the land, the creditor should have it for a price named. The price appeared to be equal; and yet the paction was voided, as obtained by extortion†.

\* Fountainhall, June 20. 1696, Sutherland contra Sinclair.

† November 30. 1736, Brown contra Muir.



Upon the same ground, a bond for a sum taken from the principal debtor by his cautioner as a reward for lending his credit, was voided \*.

Rigorous creditors go sometimes differently to work. If they dare not venture upon greater profit directly than is permitted by law, they aim at it indirectly, by stipulating severe irritancies upon failure of payment. One stipulation of that sort which makes a great figure in our law, is, That if the sum lent upon a wadset or pledge be not repaid at the term covenanted, the property of the wadset or pledge shall *ipso facto* be transferred to the creditor in satisfaction of the debt. This paction is in the Roman law named *lex commissoria in pignoribus*, and in that law seems to be absolutely reprobated †. With us it must be effectual at common law, because there is no statute against it. But then, as it is a hard and rigorous condition, extorted from a necessitous debtor, a court of equity will interpose to give relief. And this can be done by fol-

\* Forbes 24. Fountainhall 27. January 1711, King contra Ker.

† l. ult. C. De pactis pignorum.

lowing a general rule applicable to all cases of the kind; which is, to admit the debtor to redeem his pledge by payment, at any time, till the creditor in a declaratory process signify his will to hold the pledge in place of his money. This process affords the debtor an opportunity to purge his failure by payment; which is all that in fair dealing can be demanded by the creditor. And thus, the declarator serves a double purpose: it relieves the debtor from the hardship of a penal irritancy, by furnishing him an opportunity to pay the debt; and if he be silent, the extracted decree operates a transference of the property to the creditor, which extinguishes the debt.

Hence it follows, that the debtor can redeem the wadset or pledge, whether the bargain be luerative or no. A declarator being necessary, the property is not transferred to the creditor, if the debtor be willing to redeem his pledge: and this option he must have, whether the creditor have made profit or no by possession of the pledge. Supposing a proper wadset granted, by which the creditor makes more than the interest of his money; justice requires, that the debtor have

have an option to redeem even after the term limited, until the equity of redemption be foreclosed by a declarator; and if a declarator be necessary, as is proved, the debtor must have his option, even where the creditor has drawn less than his interest.

In equity, however, there is a material difference between a proper wadset with a *pactum legis commissoriae*, and a proper wadset where the term of redemption is not limited. In the latter case, the parties stand upon an equal footing: the creditor may demand his money when he pleases; and he has no claim for interest, because of his agreement to accept the rents instead of interest: the debtor, on the other hand, may redeem his land when he pleases, upon repayment of the sum borrowed. But the matter turns out differently in equity, where the power of redemption is by paction limited to a certain term. There being no limitation upon the creditor, he may demand his money when he pleases; and he has no claim for interest, even tho' the rents have fallen short of the interest. But if the debtor insist upon the equity of redemption after the term to which the re-

I

demption

demption is limited ; he must, beside repaying the sum borrowed, make good the interest, as far as the rent of the land has proved deficient. For impartiality is essential to a court of equity : if the one party be relieved against the rigour of a covenant, the other has the same claim : after taking the land from the creditor contrary to paction, it would be gross injustice to hold the paction good against him, by limiting him to less interest than he is entitled to by law upon an ordinary loan \*.

From what is said it will be clear, that a power of redeeming within a limited time annexed to a proper sale for an adequate price, cannot be exercised after the term limited for the redemption. The purchaser, to whom the property was transferred from the beginning, has no occasion for a declarator ; nor doth equity require the time for redemption to be enlarged contrary to paction, in a case where an adequate price is given for the subject.

\* To this case is applicable an English maxim of equity, "That he that demands equity must give equity."



MANY other hard and oppressive conditions in bonds of borrowed money, invented by rigorous creditors for their own conveniency, without the least regard to humanity or equity, were repressed by the act 140. parl. 1592. And, by the authority of that statute, such pactions may be brought under challenge in courts of common law, against which otherwise no remedy was competent except in a court of equity.

It was perhaps the statute now mentioned that misled the court of session into an opinion, that it belongs to the legislature solely to repress such rigorous conditions in agreements as are stated above. One thing is certain, that immediately after the statute there is an act of sederunt, November 27. 1592, in which the court declares, "That, in time coming, they  
" will judge and decide upon clauses ir-  
" ritant contained in contracts, tacks, in-  
" feftments, bonds, and obligations, pre-  
" cisely according to the words and mean-  
" ing of the same." Such a resolution, proper for a court of common law, is inconsistent with the nature of a court of equity. The mistake was soon discovered:  
the

the act of federunt wore out of observance; and now, for a long time, the court of session has acted as a court of equity in this as well as in other matters.

IT is usury by statute to bargain with a debtor for more than the legal interest; but it is not usury to take a proper wadset, even where the rent of the land exceeds the interest of the money. For the creditor who accepts the rent instead of interest, takes upon himself the insolvency of the tenants; and the hazard of this insolvency, however small, saves from usury; which consists in stipulating a yearly sum certain above the legal interest. But tho' such a bargain, where the rent exceeds the legal interest, is not, strictly speaking, usury; it is rigorous and oppressive, and plainly speaks out the want of credit in the person who submits to it; upon which account, it might be thought a proper subject for equity, did we not reflect that all wadsets are not lucrative. When such is the case, what shall be the judge's conduct? Must he give an opinion upon every wadset according to its peculiar circumstances? or ought he to follow some

rule that is applicable to all cases of the kind? The former opens a door to arbitrary proceedings: the latter, fettering a judge, forces him often to do what is materially unjust. Here equity, regarding individuals, weighs against utility, regarding the whole society. The latter being by far the more weighty consideration, must preponderate; and for that reason only are wadsets tolerated, even the most lucrative; for it is not safe to give any redress in equity.

This doctrine may be illustrated by a different case. A debtor standing personally bound for payment of the legal interest, is compelled to give an additional real security, by infesting the creditor in certain lands, the rent of which is paid in corn, with this proviso, "That the creditor, if he levy the rents for his payment, shall not be subjected to an account, but shall hold the rents in lieu of his interest." This, from what is observed above, is not usury; because the value of the corn, however much above the interest in common years, may possibly fall below it. But as the creditor is in all events secure of his interest by having his  
debtor.



debtor bound personally, and may often draw more than his interest by levying the rent when corn sells high; equity will relieve against the inequality of this bargain. For here the court may follow a general rule, applicable to all cases of the kind, affording a remedy equally complete in every case; which is, to oblige the creditor to account for what he receives more than his interest, and to impute the same into his capital. In the case of a proper wadset this rule would be unjust, because the creditor has a chance of getting less than his interest, which ought to be compensated with some benefit beyond the ordinary profit of money: and if the door be once opened to an extraordinary benefit, a precise boundary cannot be ascertained between more and less. But the covenant now mentioned is in its very conception oppressive; and the creditor may justly be deprived of the extraordinary benefit he draws from it, when he runs no chance of getting less than the legal interest.

*Pacta contra fidem tabularum nuptialium*  
belong to this article. Such private pac-  
tions



tions between the bridegroom and his father, contrary to the marriage-articles openly agreed on, are hurtful to the wife and children; who will therefore be relieved upon the head of fraud. But the husband cannot be so relieved, because as to him there is no fraud: he is relieved upon the head of extortion. Every such private paction is, by construction of law, extorted from him: and the construction is just, considering his dependent situation; for the fear of losing his bride, leaves him not at liberty to refuse any hard terms that may be imposed by his father, who settles the estate upon him. The relief granted to the wife and children upon the head of fraud, comes properly under the following section; but for the sake of connection is introduced here. In a contract of marriage the estate was settled upon the bridegroom by his father; and the bride's portion was taken payable to the father, which he accepted for satisfaction of the debts he owed, and for provisions to his younger children. The son afterward having privately before the marriage granted bond for a certain sum to his father, it was voided at the wife's instance,

stance, as *contra fidem tabularum nuptialium* \*. Hugh Campbell of Calder, in the marriage-articles of his son Sir Alexander, became bound to provide the family-estate to him and the heirs-male of the marriage, "free of all charge and burden." He at the same time privately obtained from his son a promise to grant him a faculty of burdening the estate with L. 2000 Sterling to his younger children; which promise Sir Alexander fulfilled after the marriage, by granting the faculty upon a narrative "of the promise, and that the marriage-articles were in compliance with the bride's friends, that there might be no stop to the marriage." In a suit against the heirs of the marriage for payment of the said sum, at the instance of Hugh's younger children, in whose favour the faculty was exercised, the defendants were assolzied, the deed granting the faculty being *in fraudem pactorum nuptialium* †. The following cases relate to the other branch, namely oppression, intitling the husband to reduce deeds granted by him-

\* Stair, July 21. 1668, Paton contra Paton.

† Feb. 8. 1718, Pollock contra Campbell of Calder.

felf. A man, after settling his estate upon his eldest fon in that fon's contract of marriage, warranting it to be worth 8000 merks of yearly rent, did, before the marriage, take a discharge from his fon of the said warrandice. The estate settled on the fon falling fhort of the rent warranted, he infifted in a procefs againft his father's other representatives for voiding the discharge; and the fame accordingly was voided, as *contra fidem* \*. A discharge of part of the portion before solemnization of the marriage, was voided as *contra fidem*, at the instance of the granter himfelf, becaufe it was taken from him privately, without the concurrence of the friends whom he had engaged to affift him in the marriage-treaty †. In England the fame rule of equity obtains. It is held, that where the fon, without privity of the father or parent, treating the match, gives a bond to refund any part of the portion, it is voidable ‡. Thus the bridegroom's

\* Forbes, Jan. 28. 1709, M'Guffock contra Blairs.

† Home, Nov. 22. 1716, Viscount of Arbutnot contra Morifon of Preftongrange.

‡ Abridg. cafes in enquiry, chap. 13. feft. E. § 1.



mother surrenders part of her jointure to enable her son to make a settlement upon the bride, and the bride's father agrees to give L. 3000 portion. The bridegroom, without privity of his mother, gives a bond to the bride's father, to pay back L. 1000 of the portion at the end of seven years. Decreed, That the bond shall be delivered up, as obtained in fraud of the marriage-agreement \*. On the marriage of Sir Henry Chancey's son with Sir Richard Butler's daughter, it was agreed, that the young couple should have so much for present maintenance. The son privately agrees with his father to release part. The agreement was set aside, though the son, as was urged, gave nothing but his own, and might dispose of his present maintenance as he thought fit †.

I promise a man a sum not to rob me. Equity will relieve me, by denying action for payment, and by affording me an action for recalling the money, if paid. The latter action is, in the Roman law, styled,

\* Abridg. cases in equity, chap. 13. sect. E. § 2.

† Ibid. § 3.



*Condictio ob injustam causam.* To take money for doing what I am bound to do without it, must be extortion: I hold the money *sine justa causa*, and ought in conscience to restore it. Thus it is extortion for a tutor to take a sum from his pupil's mother for granting a factory to her \*. And it was found extortion in a man to take a bond from one whose curator he had been, before he would deliver up the family-writings †.

A bargain of hazard with a young heir, to have double or treble the sum lent, after the death of his father or other contingency, is not always set aside in equity; for at that rate it would be difficult to deal with an heir during the life of his ancestor. But if such bargain appear very unequal, it is set aside, upon payment of what was really lent, with interest ‡. One intitled to an estate after the death of two tenants for life, takes L. 350 to pay L. 700 when the lives should fall, and

\* Durie, penult. Feb. 1639, *Musket contra Dog*.

† Nicolson, (*turpis causa*), July 24. 1634, *Rossie contra her curators*.

‡ Abridg. cases in equity, ch. 13. sect. G. § 1. note.

mortgages the estate as a security. Tho' both the tenants for life died within two years, yet the bargain being equal, no relief was given against it\*. A young man, presumptive heir to an estate-tail of L. 800 yearly, being cast off by his father, and destitute of all means of livelihood, made an absolute conveyance of his remainder in tail to I. S. and his heirs, upon consideration of L. 30 paid him in money, and a security for L. 20 yearly during the joint lives of him and his father. Though the father lived ten years after this transaction, and though I. S. would have lost his money had the heir died during his father's life, yet the heir was relieved against the conveyance†. The plaintiff, a young man, who had a narrow allowance from his father, on whose death a great estate was to descend to him in tail, having, in the year 1675, borrowed L. 1000 from the defendant, became bound, in case he survived his father, to pay the defendant L. 5000 within a month after his father's death, with interest; but that,

\* Abridg. cases in equity, chap. 32. sect. I. § 2.

† Ibid, § 1.

if he did not outlive his father, the money should not be repaid. After the father's death, which happened *anno* 1679, the plaintiff brought his bill upon the head of fraud and extortion, to be relieved of this bargain, upon repayment of the sum borrowed, with interest. The cause came first before the Lord Nottingham, who decreed the bargain to be effectual. But, upon a re-hearing before Lord Chancellor Jeffreys, it was insisted, That the clause freeing the plaintiff from the debt if he died before his father, made no difference; for in all such cases the debt is lost of course, upon predecease of the heir of entail; and therefore that this clause, evidently contrived to colour a bargain which to the defendant himself must have appeared unconscionable, was in reality a circumstance against him. Though in this case there was no proof of fraud, nor of any practice used to draw the plaintiff into the bargain; yet, because of the unconscionableness of the bargain, the plaintiff was relieved against it \*. In the year 1730, the Earl of Peterborough, then Lord

\* 2. Vernon 14. Berny contra Pitt.



Mordaunt, granted bond at London, after the English form, to Dr William Abercromby, bearing, "That L. 210 was then  
 " advanced to his Lordship; and that, if  
 " he should happen to survive the Earl of  
 " Peterborough his grandfather, he was  
 " to pay L. 840 to the Doctor, two months  
 " after the Earl's death; and if he, the  
 " Lord Mordaunt, died in the lifetime of  
 " the Earl, the obligation was to be void."  
 Upon the death of the Earl of Peterborough, which happened about five years after the date of the bond, an action was brought in the court of session against the Lord Mordaunt, now Earl of Peterborough, for payment; and the court, upon authority of the case immediately foregoing, unanimously judged, that the bond should only subsist for the sum actually borrowed, with the interest \*.

\* July 13. 1745, Dr William Abercromby contra Earl of Peterborough.



## S E C T. IV.

*A man moved to act unknowingly against his interest, by fraud, deceit, or other artificial means,*

IT is thought, that a court of common law seldom interposes in any of the cases that come under the section immediately foregoing; and the reason is, that whether a man be led against his own interest by a violent temptation or by extortion, there is still left to him in appearance a free choice. But with respect to the matters that belong to the present section, a man is led blindly against his own interest, and has no choice. This species of wrong, therefore, being more flagrant, is not neglected by courts of common law. It is accordingly laid down as a general rule in the English law, "That without  
 " the express provision of an act of parliament, all deceitful practices in defrauding another of his known right, by  
 " means of some artful device, contrary  
 " to

“ to the plain rules of common honesty,  
 “ are condemned by the common law,  
 “ and punished according to the heinous-  
 “ ness of the offence \*.” Thus the cau-  
 sing an illiterate person to execute a deed  
 to his prejudice, by reading it to him in  
 words different from those in the deed, is  
 a fraud, which a court of common law  
 will redress, by setting the deed aside.  
 The same where a woman is deceived to  
 subscribe a warrant of attorney for con-  
 fessing a judgement, understanding the  
 writing to be of a different import †. In  
 selling a house, it being a lie to affirm  
 that the rent is L. 30 instead of L. 20, by  
 which the purchaser is moved to give a  
 greater price than the house is worth ;  
 this loss will be repaired by a court of  
 common law, though the purchaser, by  
 being more circumspect, might have pre-  
 vented the loss.

In general, every covenant procured by  
 fraud will be set aside in a court of com-  
 mon law. But with regard to covenants  
 or agreements disregarded at common law,  
 there can be no relief but in a court of e-

\* New abridgement of the law, vol. 2. p. 594.

† 1. Sid. 431.

quity. Thus a policy of insurance was set aside upon fraud by a bill in chancery\*.

We next proceed to enquire, whether every deceitful practice to impose upon others comes under common law. Fraud consists in my persuading a man who has confidence in me, to do an act as for his own interest, which I know will have the contrary effect. But in whatever manner a man be deceived or misled, yet if he was not deceived by relying upon the friendship and integrity of another, it is not a fraud. Fraud therefore implies treachery, without which no artifice nor double dealing can be termed *fraud* in a proper sense. But there are double-fac'd circumstances without number, and other artful means, calculated to deceive, which do not involve any degree of treachery. Where a man is deceived by such artifice, it must in some measure be his own fault; and bystanders are more apt to make him the object of their ridicule than of their sorrow: for which reason, frauds of this inferior nature have been overlooked by common law. But as every attempt to

\* 2. Vernon 206.



deceive another to his prejudice is criminal in conscience, it is the duty of a court of equity to repress such deceit, by awarding reparation to the person who suffers. Utility pleads for reparation as well as equity; for if law were not attentive to repress deceit in its bud, corruption would gain ground, and even the grossest frauds would become too stubborn for law. It is this species of deceit, excluding treachery, that Lord Coke probably had in his eye \*, when he lays down the following doctrine, That all covins, frauds, and deceits, for which there is no remedy at common law, are and were always redressed in the court of chancery.

It is mentioned above, that a covenant procured by fraud will be set aside in a court of common law; and I now give instances where a covenant procured by deceit that amounts not to fraud, is set aside in a court of equity. A man having failed in his trade, compounded with his creditors at so much per pound, to be paid at a time certain. Some of the creditors refusing to fulfil the agreement, a bill

\* 4 Inst. 84.



was brought by the bankrupt to compel a specific performance. But it appearing that he had underhand agreed with some of his creditors to pay their whole debts, in order that they might draw in the rest to a composition, the court would not decree the agreement, but dismissed the bill\*. A purchase made by a merchant in the course of commerce will be effectual, however soon his bankruptcy follow, provided it was his intention by continuing in trade to pay the price. But if he had bankruptcy in view, and no prospect to pay the price, the bargain, brought about by a palpable cheat, will be reduced in a court of equity, and the subject be restored to the vender. The only thorny point is, to detect the *animus* of the purchaser to defraud the vender. In the case of Joseph Cave †, the presumptive fraud was confined to three days before the *cessio bonorum*; but in that case Cave the purchaser was in good credit, till he demanded a meeting of his creditors in order to surrender his effects to them. Other circumstances may concur with in-

\* 2. Vernon 71. Child contra Danbridge.

† Dist. tit. Fraud.

solvency to enlarge that period. Gilbert Barclay merchant in Cromarty was in labouring circumstances, and owed much more than he was worth, when he made a purchase of salmon from Mackay of Bighouse; and before delivery several of his creditors proceeded to execution against him. A few days after delivery, he made over the salmon to William Forsyth, another merchant of the same town, in part payment of a debt due to Forsyth; who was in the knowledge that Barclay was in labouring circumstances, and that the price of the salmon was not paid. Execution thickened more and more upon him, and he broke in ten days or a fortnight after the salmon were delivered to Forsyth. From these circumstances the court presumed an intention in Barclay to defraud Bighouse: and considering that Forsyth's purchase was not made *bona fide*, they found him liable to pay to Bighouse the value of the salmon \*.

Next of other transactions brought about by deceitful means. By a marriage-

\* Mackay of Bighouse contra William Forsyth merchant in Cromarty, January 20. 1758.

settlement *A* is tenant for life of certain mills, remainder to his first son in tail. The son, knowing of the settlement, encourages a person, after taking a thirty-years lease of these mills, to lay out a considerable sum in new buildings, and other improvements, intending to take the benefit after his father's death. This is a deceit which justice discountenances; and therefore it was decreed, that the lessee should enjoy for the residue of the term that was current at the father's death\*. The defendant on a treaty of marriage for his daughter with the plaintiff, signed a writing comprising the terms of the agreement. Designing afterward to get loose from the agreement, he ordered his daughter to entice the plaintiff to deliver up the writing, and then to marry him. She obey'd; and the defendant stood at the corner of the street to see them go along to be married. The plaintiff was relieved on the point of deceit. A man having agreed to be bound for certain provisions in his son's contract of marriage, upon a promise from the son to discharge the

\* Abridgement cases in equity, cap. 47. sect. B. par. 10.

same,



same, which accordingly was done before the marriage: and after the marriage, money having been lent to the son upon the faith of the said provisions in his contract; the discharge was set aside at the instance of the creditors, as being a deceitful contrivance between father and son to entrap them \*. In a suit by the indorsee of a note or ticket, the debtor pleaded compensation upon a note for the equivalent sum, granted him by the indorser, bearing the same date with that upon which the process was founded. The court deemed this a deceitful contrivance to furnish the indorser credit; and therefore refused to sustain the compensation †.

A having an incumbrance upon an estate, is witness to a subsequent mortgage, but conceals his own incumbrance. For this wrong his incumbrance shall be postponed ‡. To mortgage land as free when there is an incumbrance upon it, is a cheat in the borrower; to which cheat the in-

\* Stair, January 21. 1680, Caddel contra Raith.

† Fountainhall, Forbes, June 11. 1708, Bundy contra Kennedy.

‡ 2 Vern. 151, Clare contra Earl of Bedford.



incumbrancer is accessory by countenancing the mortgage, and subscribing it as a witness. The hurt thus done to the lender by putting him off with a lame security, was properly repaired by preferring him before the incumbrancer. The following cases are of the same kind. A man lends his mortgage-deed to the mortgager, to enable him to borrow more money. The mortgagee being thus in combination with the mortgager to deceive the lender, is accessory to the fraud. And the hurt thereby done was properly repaired by postponing his mortgage to the incumbrance which the lender got for his money \*. A counsel having a statute from *A* which he conceals, advises *B* to lend *A* L. 1000 on a mortgage; and draws the mortgage with a covenant against incumbrances. The statute was postponed to the mortgage †. *A* being about to lend money to *B* on a mortgage, sends to inquire of *D*, who had a prior mortgage, whether he had any incumbrance on *B*'s estate. If it be proved that *D* denied he had any incumbrance,

\* 2 Vern. 726. Peter contra Ruffel.

† New abridgement of the law, vol. 2. p. 598. Draper contra Borlace.

his

his mortgage will be postponed \*. An estate being settled by marriage-articles upon the children of the marriage, which estate did not belong to the husband, but to his mother: yet she was compelled in equity to make good the settlement; because she was present when the son declared that the estate was to come to him after her death, and because she was also one of the instrumentary witnesses †.

## S E C T. V.

*What remedy is applied by a court of equity against the wrongs above stated.*

IT is proper to be premised, that regulations for preventing harm cannot be other but prohibitory; and consequently cannot afford opportunity for the interposition of any court of law till the wrong be committed. To restore the party injured to his former situation, where that method is practicable, will be preferred

\* 2 Vern. 554. Ibbotson contra Rhodes.

† 2 Vern. 150. Hunsdens contra Cheipey.

as the most complete remedy. Thus goods stolen are restored to the owner; and a disposition of land procured by fear, or undue influence, is voided, in order that the disponer may be restored to his property. But it seldom happens that there is place for a remedy so complete: it holds commonly, as expressed in the Roman law, that *factum infectum fieri nequit*; and when that is the case, the person injured, who cannot be restored to his former situation, must be contented with reparation in money.

The first question that occurs here is, Whether in money-reparation, consequential damage can be stated. Consequential damage is sometimes certain, sometimes uncertain. A house of mine rented by a tenant, is unlawfully demolished: the direct damage is the loss of the house: the consequential damage is the loss of the rent; which in this case is certain, because the unlawful act necessarily relieves the tenant from paying rent. Again, a man robs me of my horse: the direct damage is the horse lost to me: the consequential damage is the being prevented from making profit by him; which is not  
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certain,



certain, because the opportunity of making profit might have failed me, and possibly might have been neglected though it had offered. In the case first mentioned, the loss of the rent, being certain, comes properly under the estimation of actual damage; and consequently will not be excluded by a court of common law. But consequential damage that is uncertain, is not always taken into the account. And the reason follows. It is regularly incumbent on the man who claims reparation, to prove the extent of the damage he has sustained; which cannot be done with respect to consequential damage, as far as uncertain. But as it is undoubtedly a prejudice to be deprived of profit that probably might have been made; the claimant is in equity relieved from this proof, where the direct damage is the effect of a criminal act: every presumption is turned against the delinquent; and he is charged with every probable article of profit, unless he can give convincing evidence that the profit claimed could not have been made. And this is conformable to the rules of equity; for as the profits are rendered uncertain by a



criminal act, the consequences of this uncertainty ought to affect the delinquent, not his party who is innocent. Here is a fair opportunity for the interposition of equity. A court of common law cannot listen to any proof but what is complete; and cannot award damages except as far as rendered certain by evidence. A court of equity, with respect to criminal acts, turns the uncertainty against the delinquent; and by that means affords complete reparation to the person injured. Thus, in a *spuilzie*, which is a claim for damages in a civil court founded on the violent abstraction of moveable goods, the profit that might have been made by the horses carried off, termed *violent profits*, makes always an article in the estimation of damage. The rule is different, where the damage is occasioned by a culpable act only; for as there is nothing here to vary the rule of law, *Quod affirmanti incumbit probatio*, no article of profit will be sustained but what can be rendered certain by evidence. This, it is true, may possibly be prejudicial to the person who is hurt by the culpable act: but *humanum est errare*; and it is more expedient that he

suffer

suffer some prejudice, than that men should be terrified from industry and activity, by a rigorous and vague claim (a).

This doctrine is espoused by Ulpian \* :

“ Item Labeo scribit, si cum vi ventorum  
 “ navis impulsæ esset in funes anchorarum  
 “ alterius, et nautæ funes præcidissent, si  
 “ nullo alio modo, nisi præcisiss funibus  
 “ explicare se potuit, nullam actionem  
 “ dandam. Idemque Labeo, et Proculus,  
 “ et circa retia piscatorum, in quæ navis  
 “ inciderat, æstimarunt. Plane, si culpa  
 “ nautarum id factum esset, lege Aquilia  
 “ agendum. Sed ubi damni injuria agi-  
 “ tur, ob retia, non piscium, qui capti  
 “ non sunt, fieri æstimationem ; cum in-  
 “ certum fuerit, an caperentur. Idemque  
 “ et in venatoribus, et in aucupibus pro-  
 “ bandum.” The following instance is  
 an apt illustration of this doctrine. The  
 Duke of Argyle’s right of admiralty reach-

(a) In the English courts of common law there is no accurate distinction made between damage certain and uncertain. Damages are taxed by the jury, who give such damages as in conscience they think sufficient to make up the loss, without having any precise rule.

\* l. 29 § 3. ad leg. Aquil.

es over the western islands; on the coast of which a wrecked ship, floating without a living creature in it, was laid hold of and sold by authority of the Duke's depute to one Robertson, who refitted the ship at a considerable charge, and provided a crew to carry her to Clyde. Sir Ludovick Grant, who had a deputation from the Admiral of Scotland, misapprehending the bounds of his jurisdiction, gave orders for seizing the ship as his property; and these orders were put in execution after the ship was refitted by Robertson. As soon as the mistake was discovered, the ship was redelivered. But Robertson, who lost considerably by the delay, brought a process against Sir Ludovick for damages, and obtained a decree \* for a large sum, to which the direct damage amounted. It was considered, that the defendant's error was culpable in acting rashly without duly examining the limits of his jurisdiction, which might have been ascertained by inspecting the Duke's title on record. But as to the consequential damage, namely, the profits Robertson could have made by the ship

\* December 21. 1756.



had he not been unjustly deprived of the possession, which must be uncertain, the court unanimously rejected that branch of the claim.

The next question is, Whether in estimating damage there be ground in any case for admitting the *pretium affectionis*.

Paulus answers, That there is not: "Si

" *fervum meum occidisti, non affectiones*

" *æstimandas esse puto, (veluti si filium*

" *tuum naturalem quis occiderit, quem*

" *tu magno emptum velles), sed quanti*

" *omnibus valeret. Sextus quoque Pedius*

" *ait, pretia rerum, non ex affectione, nec*

" *utilitate singulorum, sed communiter*

" *fungi. Itaque eum, qui filium natura-*

" *lem possidet, non eo locupletiores esse,*

" *quod eum plurimo, si alius possideret,*

" *redempturus fuit: nec illum, qui fi-*

" *lium alienum possideat, tantum habere,*

" *quanti eum patri vendere posset: in le-*

" *ge enim Aquilia (damnum) consequi-*

" *mur, et amisisse dicemur, quod aut con-*

" *sequi potuimus, aut erogare cogimur\*."*

As this response is given in general terms, without distinction of cases, it must be considered as declaratory of the common

\* 1. 33. ad legem Aquiliam.



law. The same rule must obtain in equity where the wrong is culpable only. But in repairing mischief done intentionally, the *pretium affectionis* ought in equity to be admitted; because otherwise the person who suffers obtains no adequate reparation; and also because that otherwise there is no proper distinction made between a crime and a fault.

## C H A P. II.

Powers of a Court of Equity to remedy what is imperfect in common law, with respect to protecting the weak of mind from harming themselves by unequal bargains and irrational deeds.

**T**HE weakness and imbecillity of some men make them a fit prey for the crafty and designing. But as every deed, covenant, or transaction, procured by undue influence, comes under the foregoing chapter, the present chapter is confined to cases where equity protects individuals who

who are not misled by undue influence, from hurting themselves by their own weakness and imbecillity. And here, though for the sake of commerce utility will not listen to a complaint of inequality among *maiores, scientes, et prudentes*; yet the weak of mind ought to be excepted; because such persons ought to be removed from commerce, and their transactions be confined to what is strictly necessary for their subsistence and well-being. And this is justly confining to the weak of mind a rule against inequality in bargains, which the Romans, ignorant of commerce, made general with respect to every person.

I begin with deeds granted by persons under age, who cannot be supposed mature in judgement. A reduction upon the head of minority and lesion, unknown in the common law, is an action sustained by a court of equity for setting aside any unequal transaction done during nonage. But inequality ought not to be regarded in a deed that proceeds from a virtuous and rational motive, which would be a laudable deed in one of full age. I give the following examples. A young man under age, having no means of his own,

is

is alimented and educated by a near relation, till he happens to succeed to an opulent fortune. Full of gratitude, he grants to his benefactor a remuneratory bond for a moderate sum, and dies without arriving to full age. A court of equity will never give countenance to the heir attempting to reduce this bond; for gratitude is a moral duty, and the young man was in conscience bound to make a grateful return. A court of equity, it is true, has not many opportunities to enforce the duty of gratitude, because it can seldom be brought under a general rule; but here the court may safely interpose to support a grateful return, the extent of which is ascertained by the young man himself. I put another case. A man of an opulent fortune dies suddenly without making provisions for his younger children. His eldest son and heir supplies this omission by giving suitable provisions, and dies under age. I put a third case. A man of an opulent fortune dies suddenly, leaving a numerous family of children, all of the female sex, without making provisions for them. A collateral heir-male succeeds, who supplies this

omission



omission by giving suitable provisions, but dies under age. A court of equity would deviate from the spirit of its institution, if it should authorise a reduction of such provisions by the granter's heir, upon the head of minority and lesion. For a rational and laudable deed never can be lesion in any proper sense.

The same doctrine is applicable to those who have a natural imbecillity which continues for life. A transaction made by such a person is not voided by a court of equity, unless it appear irrational and the effect of imbecillity. Where this is the case, it becomes indeed necessary that the court interpose, though there can be no general rule for direction.

The protection afforded by equity to the weak in mind, is extended to save them from hurting themselves by irrational settlements. The opinions of men with respect to the management of affairs and the exercising acts of property, are no less various than their faces: and as the world is seldom agreed about what is rational and irrational in such matters, there can be no rule for restraining the settlements of those who are not remarkably weak,



unless such settlements be not only irrational but absurd. But as the weak and facile are protected against unequal bargains, there is the same reason for their being protected against absurd settlements. Take the following example. In a process at the instance of a brother next of kin, for voiding a testament made by his deceased sister in favour of a stranger; it came out upon proof, that, some time before making the testament, the testatrix, being seized with madness, was locked up; and that not long after making the testament her madness recurred, and continued till her death; that at the time of the testament she was in a wavering state, sometimes better, sometimes worse; in some instances rational, in others little better than delirious, never perfectly sound of mind. In particular, it appeared from the proof, that when in better health, she expressed much affection for her brother the pursuer; but that, when the disease was more upon her, she appeared to have some grudge or resentment at him without any cause. The testament was holograph; and the scroll she copied was furnished by the defendant, in whose favour  
the

the testament was made, who had ready access to her at all times, while her brother lived at a distance. In reasoning it was yielded, that the woman was capable of making a testament, and that the testament challenged might be effectual at common law. But then it was urged, That though a testament made in the condition of mind above described, preferring one relation before another, a son before a father, or a sister before a brother, might be supported in equity as well as at common law; yet that the testament in question, proceeding not from rational views, but from a diseased mind occasioning a causeless resentment against the pursuer, ought not to be supported in equity, being a deed which the testatrix herself must have been ashamed of had she recovered health. Weight also was laid upon the following circumstance, That the testament was made *remotis arbitris*, and kept secret; which showed the defendant's consciousness, that the testatrix would have been easily diverted by her friends from making so irrational a settlement. In this view, it was considered as a wrong in him to take from her, in these circumstances, an irrational

deed; and consequently, that he ought to be restrained in equity from taking any benefit by it. The testament was voided \*.

A temporary weakness ought, for the time of its endurance, to have the same effect in law with one that is perpetual: for which reason a discharge obtained from a woman during the pains of childbirth was reduced; *Fountainball, 7th December 1686.*

### C H A P. III.

Powers of a court of equity to remedy what is imperfect in common law, with respect to the natural duty of benevolence.

**I**N the Introduction there was occasion to observe, that the virtue of benevolence is by various connections converted

\* January 26. 1759, Tulloch contra Viscount of Arbutnot.



into a duty; and that duties of this kind, being neglected by the common law, are enforced by a court of equity. This opens a wide field of equity, boundless in appearance, and which would be so in reality as well as in appearance, were it not for one circumstance, That the duty of benevolence is much more limited than the virtue. The virtue of benevolence may be exercised in a great variety of good offices: it tends often to make additions to the positive happiness of others, as well as to relieve them from distress or want. But abstracting from positive engagement, the duty of benevolence is, with respect to pecuniary interest, confined to the latter. No connection, no situation, nor circumstance, makes it my duty to enlarge the estate of any person who has already a sufficiency, or to make him *locupletior*, as termed in the Roman law. For even in the strictest of all connections, that of parent and child, I feel not that I am in conscience or in duty bound, to do more than to make my children independent, so as to preserve them from want (a):  
all

(a) This proposition is illustrated in the following case. Mary Scot, daughter of Scot of Highchester, having,



all beyond is left upon parental affection. Neither doth gratitude make it my duty to enrich my benefactor, but only to aid and support him when any sort of distress or want calls for help. A favour is indeed scarce felt to be such, but when it prevents or relieves from harm; and a favour naturally is returned in kind.

Here

having, by unlucky circumstances, been reduced to indigence, was alimanted by her mother Lady Mary Drummond, at the rate of L. 20 yearly. Lady Mary, at the approach of death, settled all her effects upon Mary Sharp, her daughter of another marriage, taking no other notice of her daughter Mary Scot, but the recommending her to the charity of Mary Sharp. After the mother's death, Mary Scot brought a process for aliment against her sister Mary Sharp, founded chiefly on the said recommendation. A proof was taken of the extent of the effects contained in the settlement to the defendant, which amounted to about L. 300 Sterling. No action, either in law or equity, could be founded on the recommendation, very different in its nature from an obligation or a burden. But it was stated, that the pursuer, being very young when her father died, was educated by her mother to no business by which she could gain a livelihood: and it occurred to the court, that though the *patria potestas* is such, that a peer may breed his son a cobbler, and after settling him in business with a competent stock, is relieved from all further aliment; yet if a son be bred

Here is a clear circumscription of equity, as far as concerns the present chapter. A court of equity cannot force one man, whether by his labour or money, to add to the riches of another; because, abstracting from a promise, no connection makes this a duty. What then is left for a court of equity, is, in certain circumstances, to compel persons to save from mischief those they are connected with, or to relieve them from want or distress. Benevolence in this case is a strong impulse to afford relief; and in this case benevolence, assuming the name of *pity* or *compassion*, is by a law in

bred as a gentleman, without being instructed in any art that can gain him a farthing, he is intitled to be alimented for life; for otherwise a palpable absurdity will follow, That a man may starve his son, or leave him to want or beggary. Thus, Lady Mary Drummond, breeding her daughter to no business, was by the law of nature bound to aliment her for life, or at least till she should be otherwise provided; and the pursuer therefore being a creditor for this aliment, has a good action against her mother's representatives. The court accordingly found the pursuer intitled to an aliment of L. 12 Sterling yearly, and decerned against the defendant for the same. — 8th March 1759, *Mary Scot contra Mary Sharp*.

our nature made a positive duty. In all other cases, benevolence is a virtue only, not a duty : the exercise is left to our own choice ; and the neglect is not punished, though the practice is highly rewarded by the satisfaction it affords. In this branch of our nature, a beautiful final cause is visible : the benevolence of man, by want of ability, is confined within narrow bounds ; and in order to make the most of that slender power he has of doing good, it is wisely directed where it is the most useful, namely, to relieve others from distress.

It appears then, that equity, with respect to the duty of serving others, is not extended beyond pity or compassion. But it is circumscribed within still narrower bounds ; for compassion, though a natural duty, is not adopted in its utmost extent by courts of equity. In many cases, this duty is too vague and undetermined to be reached by human laws ; and a court of equity pretends not to interpose, but where the duty, being clear and precise, can be brought under general rules \*. Some of the connections that occasion duty so pre-

\* See the Introduction.



cise I shall proceed to handle, confining myself to those that are in some measure involved in circumstances; for the more simple connections, such as that of parent and child, require little or no elucidation. Though all the duties of this kind that are enforced by a court of equity, belong to the principle of justice; they may however be divided into different classes. The present chapter is accordingly divided into two sections. In the first are handled connections that make benevolence a duty when not prejudicial to our interest. In the second are handled connections that make benevolence a duty even against our interest. These connections are distinguishable from each other so clearly, as to prevent any confusion of ideas; and the foregoing order is chosen, that we may pass gradually from the slighter to the more intimate connections. To prompt a man to serve those with whom he is connected, requires not any extraordinary motive, when the good office thwarts not his own interest: any slight connection is sufficient to make this a duty, and therefore such connections are first discussed. It requires a more intimate connection, to



make it our duty to bestow upon another any part of our substance. Self-interest is not to be overcome but by connections of the most intimate kind, which therefore are placed last in order.

### S E C T. I.

*Connections that make benevolence a duty when not prejudicial to our interest.*

THE connection I shall first take under consideration, is that which subsists between a creditor and a cautioner. The nature of this engagement demands benevolence on the part of the creditor. The cautioner, when he pays the debt, suffers loss by the act of the creditor, though not by his fault; and the creditor will find himself bound in humanity, as far as consistent with his own interest, to assist the cautioner in operating his relief against the principal debtor. He ought in particular to convey to the cautioner, the bond with the execution done upon it, in order that the cautioner may the more speedily obtain

obtain relief from the principal. The law, favouring this moral act, considers the money delivered to the creditor, not as payment, but as a valuable consideration for assigning his debt and execution to the cautioner. I cannot explain this better than in the words of Papinian, the most eminent of all the writers on the Roman law: "Cum possessor unus, expediendi negotii causa, tributorum jure conveniatur; adversus cæteros, quorum æque prædia tenentur, ei, qui conventus est, actiones a fisco præstantur: scilicet ut omnes pro modo prædiorum pecuniam tributi conferant: nec inutiliter actiones præstantur tametsi fiscus pecuniam suam recipiaverit, quia nominum venditorum pretium acceptum videtur\*."

From which consideration it follows, that this assignment may be demanded and granted *ex post facto*, if the precaution be omitted when the money is paid.

From this connection it also follows, that the creditor is bound to convey to the cautioner every separate security he has for the debt; and consequently, that if the cre-

\* l. 5. De censibus.

ditor discharge or pass from his separate security, the cautioner, as far as he suffers thereby, hath an exception in equity against payment.

I must observe historically, that there are many decisions of the court of session, declaring the creditor not bound to grant the assignment first mentioned. These decisions, remote in point of time, will not be much regarded; because the rules of equity lay formerly in greater obscurity than at present. And there is an additional reason for disregarding them, that they are not consistent with others relating to the same subject. If it be laid down as a rule, That the creditor is not bound to assign his bond and execution, it ought to follow, that neither is he bound to assign any separate security: if it be not his duty to serve the cautioner in the one case, it cannot be his duty to serve him in the other. And yet it is a rule established in this court, That the cautioner, making payment of the debt, is intitled to every separate security of which the creditor is possessed. One is at no loss to discover the cause of this discrepancy: when the question is about a separate security upon which

which the cautioner's relief may wholly depend, the principle of equity makes a strong impression: its impression is slighter when the question is only about assigning the bond, which has no other effect but to save a process.

It is of the greater consequence to settle with precision the equitable rule that governs questions between the creditor and cautioner, because upon it depends, in my apprehension, the mutual relief between co-cautioners. Of two cautioners bound for the same debt at different times and in different deeds, one pays the debt upon a discharge without an assignment: where is the legal foundation that intitles this man to claim the half from his fellow-cautioner? The being bound in different deeds, affords no place for supposing an implied stipulation of mutual relief: nay, supposing them bound in the same deed, we are not from that single circumstance to imply a mutual consent for relief, but rather the contrary when the clause of mutual relief is omitted; for, in general, when an obvious clause is left out of a deed, it is natural to ascribe the omission to design rather than to forgetfulness.

The



The principal debtor is *ex mandato* bound to relieve all his cautioners : but there is no medium at common law, by which one cautioner can demand relief from another. And with respect to equity, the connection of being bound for payment of the same debt, is too slight to intitle that cautioner who pays the whole debt, to be indemnified in part out of the goods of his fellow. It appears then, that the claim of mutual relief among co-cautioners, can have no foundation other than the obligation upon the creditor to assign upon payment. This assignment in the case of a single cautioner must be total; in the case of several must be *pro rata*; because the creditor is equally connected with each of them. The only difficulty is, that at this rate, there is no mutual relief unless an assignment be actually given. But this difficulty is easily surmounted. We have seen above, that such assignment may be granted *ex post facto* : hence it is the duty of the creditor to grant the assignment at whatever time demanded; and if the creditor prove refractory, the law will interpose to hold an assignment as granted, because it ought to be granted. And this suppletory or implied

plied legal assignment, is the true foundation of the mutual relief among co-cautioners, which obtains both in Scotland and England.

Utility concurs to support this equitable claim: no situation with regard to law would be attended with more pernicious consequences, than to permit a creditor to oppress one cautioner and relieve others: judges ought to be jealous of such arbitrary powers, which will generally be directed by bad motives; often by resentment, and, which is still worse, more often by avarice. It is happy therefore for mankind, that two different principles coincide in matters of this kind, to put them upon a just and salutary footing.

The creditor, as has been said, being bound to all the cautioners equally, cannot legally give an assignment to one of them in such terms as to intitle him to claim the whole from the other cautioners. In what terms then ought the assignment to be granted? or when granted without limitation, what effect ought it to have in equity? This is a question of some subtilty. To permit the assignee to demand the whole from any single cautioner,

tioner, deducting only his own part of the debt, is unequal ; because it evidently gives the assignee an advantage over his co-cautioners. On the other hand, the assignee is in a worse situation than any other of them, if he must submit to take from each of them separately his proportion of the debt : upon this plan, the cautioner who pays the debt, is forc'd to run the circuit of all his co-cautioners ; and if one or two prove insolvent, he must renew the suit against the rest, to make up the proportions of those who are deficient. To preserve therefore a real equality among the cautioners, every one of them against whom relief is claimed, ought to bear an equal proportion with the assignee. To explain this rule, I suppose six cautioners bound in a bond for six hundred pounds. The first paying the debt, is intitled to claim the half from the second, who ought to be equally burdened with the first. When the first and second again attack the third, they have a claim against him each for a hundred pounds ; which resolves in laying the burden of two hundred pounds upon each ; — and so on till the whole cautioners be discussed. This

method not only preserves equality, but avoids after-reckonings in case of insolvency.

So far clear when relief can be directly obtained. But what if the assignee be put to the trouble of adjudging for his relief? In that case, the assignment is a legal title to lead an adjudication for the whole debt. Equity is satisfied, if no more be actually drawn out of the estate of any of the co-cautioners, than what that co-cautioner is bound to contribute as above. And in leading the adjudication, not even the adjudger's own proportion of the debt ought to be deducted: it is a benefit to the other cautioners that the security be as extensive as possible; for it intitles the adjudger to a greater proportion of the subject or price, in competition with extraneous creditors.

The same principles and conclusions are equally applicable to *correi debendi*, where a number of debtors are bound conjunctly and severally to one creditor. Equity requires the utmost impartiality in him to his debtors: if for his own ease he take the whole from one, he is bound to grant an assignment precisely as in the case of co-cautioners. Utility joins with equity



to enforce this impartiality. And it makes no difference whether the *correi debendi* be bound for a civil debt, or be bound *ex delicto*; for in both cases equally it is the duty of the creditor to act impartially, and in both cases equally utility requires impartiality.

Another connection, of the same nature with the former, is that between one creditor who is interest in two different tenements for his security, and another creditor who hath an interest on one of the tenements, of a later date. Here the two creditors are connected, by having the same debtor, and a security upon the same subject. Hence it follows, as in the former case, that if it be the will of the preferable creditor to draw his whole payment out of that subject in which the other creditor is interest, the latter for his relief is intitled to have the preferable security assigned to him: which can be done upon the construction above mentioned; for the sum recovered by the preferable creditor out of the subject on which the other creditor is also interest, is justly understood to be advanced by the latter, being a sum which he was intitled to, and must

must have drawn had not the preferable creditor intervened; and this sum is held to be the purchase-money of the conveyance. This construction, preserving the preferable debt entire in the person of the second creditor, intitles him to draw payment of that debt out of the other tenement. By this equitable construction, matters are restored to the same state as if the first creditor had drawn his payment out of the separate subject, leaving the other entire for payment of the second creditor. Utility also concurs to support this equitable claim.

It is scarce necessary here to observe, that a supposed conveyance, sufficient as above mentioned to found a claim of relief among co-cautioners, will not answer in the present case. In order to found an execution against land, there must be an infestment; and this infestment must be conveyed to the person who demands execution. Any just or equitable consideration may be sufficient to found a personal action; but even personal execution cannot proceed without a formal warrant, and still less real execution.

But now, admitting it to be the duty of

the preferable creditor to assign, the question is, To what extent. Whether ought the assignment to have a total effect, or only to put the disappointed creditor in the same situation as if the preferable creditor had drawn his payment proportionally out of both subjects? It will be made appear by and by, that the assignment must be confined to the latter effect in the case of two secondary creditors. But there is no equity to limit the assignment in this manner, where there is no interest in opposition but that of the debtor. He has no equitable interest to oppose a total assignment; and the second creditor has an equitable claim to all the aid the first creditor can afford him.

The rules of equity must be the same in every country where law is cultivated. By the practice in England \*, if the creditors sweep away the personal estate, the real estate will be charged for payment of the legacies. In this case, the legatees need no assignment to found their equitable claim against the heir who succeeds to the real estate.

We proceed to another connection, which

\* 2 Chancery Cases 41

is that between the preferable creditor infest in both tenements, and two secondary creditors, one infest in one of the tenements, and one in the other. The duty of the preferable or catholic creditor, with relation to these secondary creditors, cannot be doubtful considering what is said above. Equity as well as expediency bars him from arbitrary measures. He is equally connected with his two fellow-creditors, and he must act impartially between them. The equitable measure is, to draw his payment proportionally out of both tenements; but if, for his own ease or conveniency, he chuse to draw the whole out of one, the postponed creditor is intitled to an assignment; not indeed total, which would be an arbitrary act, but proportional, so as to intitle him to draw out of the other subject, what he would have drawn out of his own, had the preferable creditor drawn proportionally out of both subjects. I need scarce mention, that the same rule which obtains in the case of secondary creditors, must equally obtain among purchasers of different parcels of land, which before the purchase were all *in cumulo* burdened with an infestment



infestment of annualrent. A man grants a rent-charge out of all his lands, and afterward sells them by parcels to diverse persons: the grantee of the rent-charge levies his whole rent from one of these purchasers: this purchaser shall be eased in equity by a contribution from the rest of the purchasers \*.

A case connected with that last handled, will throw light upon the present subject. Let it be supposed, that the catholic or preferable creditor purchases one of the secondary debts: will this vary the rule of equity? This purchase in itself lawful, is not prohibited by any statute, and therefore must have its effect. The connection here between the creditors is by no means so intimate, as to oblige any one of them, at the expence of his own interest, to serve the others. There is no rule in equity to bar the catholic creditor from drawing full payment of the secondary debt out of the tenement which it burdens, reserving his catholic debt to be made effectual out of the other tenement; though of consequence the secondary creditor upon that tenement

\* Abridg. cases in equity, cap. 18. sect. A. § 1.

is totally disappointed. This secondary creditor has no claim for an assignment, total or partial, when the interest of the catholic creditor stands in opposition. But here the connection among the parties must, in my apprehension, have the following equitable operation, that the catholic creditor, by virtue of his purchase, cannot draw more than the sum he paid for it. Equity in this case will not allow the one to profit by the other's loss. But a hint here must suffice; because the point belongs more properly to another head \*.

The following case proceeds upon the principle above laid down. The husband, on the marriage, charged the lands with a rent-charge for a jointure to his wife, and afterward devised part of these lands to the wife. After the husband's death, the heir prayed that the lands devised to the wife might bear their proportion of the rent-charge: the bill was dismissed, because the grantee of the rent-charge may distrain in all or any part of the lands for her rent; and there is no equity to abridge her remedy †.

\* Immediately below, sect. 2. art. 1.

† 1 Vern. 347.

If the catholic creditor, after the existence of both secondary debts, renounce his interest with respect to one of the tenements, which makes a clear fund for the secondary creditor secured upon that tenement; such renunciation ought to have no effect in equity against the other secondary creditor, because it is an arbitrary deed, and a direct breach of that impartiality which the catholic creditor is bound to observe with relation to the secondary creditors. It is in effect the same with granting a total assignment to one of the secondary creditors against the other.

In every one of the cases mentioned, the catholic creditor is equally connected with each of the secondary creditors, and upon that account is bound to act impartially between them. But this rule of equity cannot take place where the connections are unequal. It holds here as among blood-relations: those who are nearest to me, are intitled to a preference in my favour. The following case will be a sufficient illustration. A man takes a bond of borrowed money with a cautioner; obtains afterward an interest from the  
I principal

principal debtor as an additional security; and last of all, another creditor for his security obtains infestment upon the same subject. Here the first-mentioned creditor has two different means for obtaining payment: he may apply to the cautioner, or he may apply to the land in which he is infest. He proceeds to execution against the land, by which he cuts out the second creditor. Is he bound to grant an assignment to the second creditor against the cautioner, total or partial? The second creditor is in this case not intitled to demand an assignment: on the contrary, the preferable creditor, taking payment from the cautioner, is bound to give him a total assignment; because he is more intimately connected with the cautioner than with the second creditor. A cautionary engagement is an act of pure benevolence; and when a creditor lays hold of this engagement to oblige one man to pay another's debt, this connection makes it evidently the duty of the creditor to aid the cautioner with an assignment, in order to repair his loss; and it proceeds from the same intimacy of connection, that, as above mentioned, he is obliged to include



in this assignment every separate security he has for the debt. It is his duty accordingly to convey to the cautioner the real security he got from the principal debtor. Nor is the interest of the second creditor regarded in opposition ; for he is no other way connected with the preferable creditor, but by being both of them creditors to the same person, and both of them interest on the same subject for security.

A question of great importance that has frequently been debated in the court of session, appears to depend upon the principles above set forth. The question is, Whether a tenant in tail be bound to extinguish the annual burdens arising during his possession, so as to transmit to the heirs of entail the estate in as good condition as when he received it. To treat this question accurately, we must begin with considering how the common law stands. With respect to feu-duties, cess, and teind, these are *debita fructuum*, and at common law afford an action for payment against every person who levies the rents, and against a tenant in tail in particular. But this is not the case of the entailor's personal debts, which burden the heirs

heirs of entail personally, but not the fruits. Let us consider what that difference will produce. An heir in a fee-simple is liable to the debts of his predecessor, and every heir is so liable successively. But this obligation respects the creditors only; and affords no relief to one heir against another either for principal or interest. Does an entail make a difference at common law? A tenant in tail possesses the rents: but these rents are his property, just as much as if the estate were a fee-simple; and the consuming rents belonging to himself, cannot subject him as tenant in tail more than if his estate were a fee-simple. Hence it appears clear, that at common law a tenant in tail is not bound to relieve the heirs of entail of any growing burden, unless what is a *debitum fructuum*.

A court of equity, less confined than a court of common law, finds this case resolvable into one above determined, namely, that of *correi debendi*, where several debtors are conjunctly bound for payment of one debt. There is no difference between *correi debendi* and heirs of entail, but that the former are all of them liable at

the same time, the latter only successively; which makes no difference either in equity or in expediency, the same impartiality being required of the creditor with respect to both. While the debt subsists, the creditor is bound to lay the burden of his interest upon each heir equally; consequently each heir is bound to pay the interest that arises during his time. And if the principal be demanded, the heir who pays is only intitled to an assignment of the principal sum, and of the interest that shall arise after his own death. This rule accordingly obtains in England, as where a proprietor of land, after charging it with a sum of money, devises it to one for life, remainder to another in fee. Equity will compel the tenant for life to pay the arrears due on the rent-charge, that all may not fall upon the remainder-man \*.

A tenant by curtesy is, like a tenant in tail, bound to extinguish the current burdens. The curtesy is established by customary law; and a court of equity is intitled to supply any defect in law, whether written or customary, in order to make the law rational. The law, autho-

\* 1. Chancery cases 223.

rising the husband to possess the wife's estate, intends no more but to give him the enjoyment of it for life, without waste, confining him to act like a *bonus paterfamilias* \*.

The following case seems to require the interposition of a court of equity; and yet whether its powers reach so far is doubtful. A man assigns to a relation of his L. 500 contained in a bond specified, without power of revocation, reserving only his own life-rent. Many years after, forgetting the assignment, he makes a will, naming this same relation his executor and residuary legatee, bequeathing in the testament the foresaid bond of L. 500 to another relation. The testator's effects, abstracting from the bond, not exceeding in value L. 500, it becomes to the executor nominate a matter indifferent, whether he accept the testament, or betake himself to his own bond. But it is not indifferent to others; for if he undertake the office of executor, he must convey the bond to the special legatee; if he cling to the bond, rejecting the office, the testament falls to the ground, and the next of kin will take

\* Home, Jan. 3. 1717, Anna Monteith.



the effects, leaving nothing to the special legatee. The interest of others ought not to depend on the arbitrary will of the executor nominate; and yet, as far as appears, there is no place here for the interposition of equity. The privilege of accepting or rejecting a right, no man can be deprived of; and, admitting this privilege, the consequences that follow seem to be out of the reach of equity.

Land-estates that are conterminous, form such a connection between the proprietors, as to make certain acts of benevolence their duty, which belong to the present subject. To save my ground from water flowing upon it from a neighbouring field, a court of equity will intitle me to repair a bulwark within that field, provided the reparation do not hurt the proprietor \*. The following is a similar case. The course of a rivulet which serves my mill happens to be diverted, a torrent having filled with stones or mud the channel in my neighbour's ground above. I will be permitted to remove the obstruction though in my neighbour's property, in

\* 1. 2. § 5. in fine, De aqua, et aquæ pluviz arcen.

order to restore the rivulet to its natural channel. My neighbour is bound to suffer this operation, because it relieves me from damage without harming his property.

But in order to procure any actual profit, or to make myself *locupletior*, equity will not interpose or intitle me to make any alteration in my neighbour's property, even where he cannot specify any prejudice by the alteration. The reason is given above, That equity never obliges any man, whether by acting or suffering, to encrease the estate of another. Thus, the Earl of Eglinton having built a mill upon the river of Irvine, and stretched a dam-dike cross the channel, which occasioned a stagnation to the prejudice of a superior mill; Fairly, the proprietor of this mill, brought a process, complaining that his mill was hurt by the back-water, and concluding that the Earl's dam-dike be demolished, or so altered as to give a free course to the river. The stagnation being acknowledged, the Earl proposed to raise the pursuer's mill-wheel ten inches, which would make the mill go as well as formerly; offering security against all future

ture damage: and urged, that to refuse submitting to this alteration would be acting in *emulationem vicini*, which the law doth not indulge. The court judged the defendant's dam-dike to be an encroachment on the pursuer's property, and ordained the same to be removed or taken down as far as it occasioned the restagnation\*.

## S E C T. II.

*Connections that make benevolence a duty even against our interest.*

THESE connections must be very intimate; for, as observed in the beginning of the present chapter, it requires a much stronger connection to oblige me to bestow upon another any portion of my substance, than merely to do a good office which takes nothing from me. The bulk of these connections, though extremely various, may be brought under the fol-

\* Jan. 27. 1744, Fairly contra Earl of Eglington.

lowing heads. 1st, Connections that intitle a man to have his loss made up out of my gain. 2d, Connections that intitle a man who is not, properly speaking, a loser, to partake of my gain. 3d, Connections that intitle one who is a loser to a recompence from one who is not a gainer.

ART. I. *Connections that intitle a man to have his loss made up out of my gain.*

No personal connection, supposing the most intimate, that of parent and child, can make it an act of justice, that one who is a gainer, should repair the loss sustained by another, unless there be also some connection between the loss and gain; and that connection is a capital circumstance in the present speculation. The connections hitherto mentioned relate to persons; this relates to things. If, for example, I lay out my money for meliorating a subject that I consider to be my own, but which is afterward discovered to be the property of another; my loss in this case is



intimately connected with his gain, because in effect my money goes into his pocket.

The connection between the loss and gain may be more or less intimate : and its different degrees of intimacy ought to be carefully noted. When this connection is found in the highest degree, there is scarce requisite any other circumstance to oblige one to apply his gain for making up another's loss : in its lower degrees, no duty arises, unless the persons be otherwise strongly connected. Proceeding then to trace these degrees, the lowest I have occasion to mention, is where the loss and gain are connected by their relation to the same subject. For example, a man purchases at a low rate one of the preferable debts upon a bankrupt estate ; and upon a sale of the estate draws more than the transacted sum : he gains while his fellow-creditors lose considerably. The next degree going upward, is where my gain is the occasion of another's loss. For example, a merchant foreseeing a scarcity, purchases all the corn he can find in the neighbourhood, with a view to make great profit : before he opens his granaries, I import a large

large cargo from abroad, retailing it at a moderate price, under what my brother-merchant paid for his cargo; by which means he loses considerably. The third, pretty much upon a level with the former, is where another's loss is the occasion of my gain. For example, my ship loaded with corn proceeds, in company with another, to a port where there is a scarcity: the other ship being foundered in a storm, and the cargo lost, my cargo by that means draws a better price. The fourth connection is more intimate, the loss and the gain proceeding from the same cause. In the case last mentioned, suppose the weaker vessel, dashed against the other in a storm, is sunk: here the same cause by which the one proprietor loses, proves beneficial to the other. The last connection I shall mention, and the completest, is where that which is lost by the one is gained by the other; or, in other words, where the money of which the one is deprived benefits the other. This is the case first mentioned, of money laid out by a *bona fide possessor*, in meliorating a subject that is afterward claimed by the proprietor.

The money that the former loses is gained by the latter.

A famous maxim of the Roman law, *Nemo debet locupletari aliena jactura*, is applicable to this article : and in order to ascertain, if it can be done, what are the connections that make it the duty of one man to part with his gain for repairing another's loss, I shall begin with a commentary upon that maxim. I observe first, That it is expressed abstractly, as holding true in general, without distinction of persons ; and therefore that the duty it establishes must be founded upon a real connection, independent altogether of personal connections : which leads us to examine what that real connection must be. *Nemo debet locupletari aliena jactura*, or, No person ought to profit *by* another's loss, implies a connection between the loss and the gain : it implies that the gain arises *by* the loss, or *by means* of the loss. Taking therefore the maxim literally, it ought to take place where-ever the gain is occasioned by the loss, or perhaps occasions the loss ; which certainly is not good law. In the second and third cases above mentioned, the same cause that destroys the  
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the one merchant is profitable to the other : yet no man who in such circumstances makes profit, finds himself bound in conscience to make up the other's loss. It appears then, that this maxim, like most general maxims, is apt to mislead by being too comprehensive. Upon serious reflection, we find, that what a man acquires by his own industry, or by accident, however connected with the loss sustained by another, will not be taken from him to make up that loss, if there be no personal connection. The only real connection that of itself binds him, is where another's money is converted to his use. This circumstance, though without any intention to benefit him, will bind him in conscience to make up the other's loss as far as he himself is a gainer. Here the maxim, *Nemo debet locupletari aliena jactura*, taken in its most extensive sense, is applicable; and the single case, as far as I understand, where it is applicable. The most noted case of this kind is, where the possessor of a subject which he *bona fide* considers to be his own, bestows his money on reparations and meliorations, intending nothing but his own benefit : the proprietor



proprietor claims the subject in a process, and prevails : he profits by the meliorations ; and the money bestow'd on these meliorations is converted to his use. Every one must be sensible of a hardship that requires a remedy ; and it must be the wish of every disinterested person, that the *bona fide possessor* be relieved from the hardship. That the common law affords no relief, will be evident at first sight : the labour and money of the *bona fide possessor* is sunk in the subject, and has no separate existence upon which to found a *rei vindicatio* : the proprietor, in claiming the subject, does no more but exercise his own right ; which cannot subject him personally to any demand. If then there be a remedy, it can have no other foundation but equity ; and that there is a remedy in equity, will appear from the following considerations. Man being a fallible creature, society would be uncomfortable were individuals disposed in every case to take advantage of the mistakes and errors of others. But the author of our nature has more harmoniously adjusted its different branches to each other. To make it a law in our nature, never to take advantage of  
error

error in any case, would be giving too much indulgence to indolence and remission of mind, tending to make us neglect the improvement of our rational faculties. On the other hand, to make it lawful to take advantage of error in every case, would be too rigorous, considering how difficult it is for a man to be always upon his guard. The author of our nature has happily moulded it so as to avoid these extremes. No man is conscious of wrong when, to save himself from loss, he takes advantage of an error committed by another : if there must be a loss, the moral sense dictates, that it ought to rest upon the person who has committed an error, however innocently, rather than upon him who has been careful to avoid all error. But *in lucro captando*, the moral sense teaches a different lesson : every one is conscious of wrong, when an error is laid hold of to make gain by it. The consciousness of injustice, when such advantage is taken, is indeed inferior in degree, but the same in kind with the injustice of robbing an innocent person of his goods or of his reputation. This doctrine is supported by utility as well as by justice.

justice. Industry ought to be encouraged; and chance as much as possible ought to be excluded from all dealings, in order that individuals may promise to themselves the fruits of their own industry. This affords a fresh instance of that beautiful harmony which subsists between the internal and external constitution of man. A regular chain of causes and effects, leaving little or nothing to accident, is advantageous externally by promoting industry, and internally by the delight it affords the human mind. No scene is more disgusting than that of things depending on chance, without order or connection. When a court of equity therefore preserves to every man, as much as possible, the fruits of his own industry; such proceeding, by rectifying the disorders of chance, is authorised by utility as well as by justice. And hence it is a principle of morality, founded both on the nature of man and on the interests of society, That we ought not to make gain by another's error.

This principle is clearly applicable to the case above mentioned. The titles of land-property being intricate, and often uncertain, instances are frequent, where a

man in possession of land, the property of another, is led by unavoidable error to consider it as belonging to himself: his money is bestow'd without hesitation on repairing and meliorating the subject. Equity will not permit the owner to profit by such mistake, and in effect to pocket the money of the innocent possessor: he will be compelled by a court of equity to make up the loss, as far as he is *locupletior*. Thus the possessor of a tenement, having, on the faith and belief of its being his own, made considerable meliorations, was found intitled to claim from the proprietor the expence of such meliorations as were profitable to him by raising the rent of his tenement \*. In all cases of this kind, what is lost to the one accrues to the other. The maxim then must be understood in this limited sense; for no connection between the loss and gain inferior in degree to this, will, independent of personal connections, be a sufficient foundation for a claim in equity against the per-

\* Stair, January 18. 1676, Binning contra Brotherhanes.



son who gains, to make up the other's loss.

But supposing the subject meliorated to have perished before bringing the action, is the proprietor notwithstanding liable? I answer, That where equity makes benevolence a duty to those who benefit us without intending it, it is not sufficient that there has been gain one time or other: it is implied in the nature of the claim, that there must be gain at the time of the demand; for if there be no gain at present, there is no subject out of which the loss can be made up.

It will not be thought an unnecessary digression to observe a peculiarity in the Roman law with respect to this matter. As that law stood originally, the *bona fide possessor* had no claim for his expences. This did not proceed from ignorance of equity, but from want of a *formula* to authorise the action; for at first when *briefes* or forms of action were invented\*, this claim was not thought of. But an exception was soon thought of to intitle the *bona fide possessor* to retain the subject, till he got payment of his expence; and this ex-

\* See Historical law tracts, tract 8.

ception the judges could have no difficulty to sustain, because exceptions were not subjected to any *formula*. The inconvenient restraint of these *formulae* was in time broken through, and *actiones in factum*, or *upon the case*, were introduced, which are not confined to any *formula*. After this innovation, the same equity that gave an exception, produced also an *actio in factum*; and the *bona fide possessor* was made secure as to his expences in all cases, namely, by an exception while he remained in possession, and by an action if he happened to lose the possession.

Another case, differing nothing from the former in effect, though considerably in its circumstances, is where, upon a fictitious mandate, one purchases my goods, or borrows my money, for the use of another. That other is not liable *ex mandato*, because he gave no mandate: but if I can prove that the money or goods were actually applied for his use, equity affords me a claim against him, as far as he is a gainer. Thus, in an action for payment of merchant-goods purchased in name of the defendant, and applied to his use, the defendant insisted, that he gave no commission;

mission; and that if his name was used without his authority, he could not be liable. "It was decreed, That the goods " being applied to the defendant's use, he " was liable, unless he could prove that " he paid the price to the person who be- " spoke the goods \*." This case, like the former, rests entirely upon the real connection between the loss and gain, independent of which there was no connection between the parties. And in it, perhaps more clearly than in the former, every one must be sensible, that the man who reaps the benefit is in duty bound to make up the other's loss. Hence the action *de in rem verso*, the name of which we borrow from the Romans. In a case precisely similar, the court inclined to sustain it relevant to *affoillzie* or acquit the defendant, that the goods were gifted to him by the person who purchased them in his name. But as donation is not presumed, he was found liable, because he could not bring evidence of the alleged donation †. Upon the supposition of a gift, it could not well

\* Stair, February 20. 1669. Bruce contra Stanhope.

† July 1726, Hawthorn contra Urquhart.

be specified that the defendant was *locupletior*: a man will spend liberally what he considers as a present, though he would not lay out his money upon the purchase.

Having endeavoured to ascertain, with all possible accuracy, that degree of connection between the loss and gain, which is requisite to afford a relief in equity by obliging the person who gains to make up the other's loss, I proceed to ascertain the precise meaning of loss and gain as understood in the maxim. And the first doubt that occurs is, Whether the term *locupletior* comprehends every real benefit, prevention of loss as well as a positive increase of fortune; or whether it be confined to the latter. I explain myself by examples. When a *bona fide possessor* rears a new edifice upon another man's land, this is a positive accession to the subject, which makes the proprietor *locupletior* in the strictest sense of the word. But it may happen that the money laid out by the *bona fide possessor* is directed to prevent loss; as where he fortifies the bank of a river against its incroachments, where he supports a tottering edifice, or where he transacts a claim that threatened to carry off the  
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the property. Is the maxim applicable to cases of this kind, where loss is only prevented, without any positive increase of wealth or fortune? When a work is done that prevents loss, the subject is thereby improved and made of greater value. A bulwark that prevents the incroachments of a river, makes the land sell at a higher price; and a real accession, such as a house built, or land inclosed, will not do more. The only difference is, that a positive accession makes a man richer than he formerly was; a work done to prevent loss makes him only richer than he would have been had the work been left undone. This difference is too slight to have any effect in equity. The proprietor gains by both equally; and in both cases equally he will feel himself bound in justice to make up the loss out of his gain. A *bona fide possessor* who claims money laid out by him to support a tottering edifice, is *certain de damno evitando*, as well as where he claims money laid out upon meliorations; and the proprietor claiming the subject, is *certain de lucro captando* in the one case as well as in the other. Here equity supports the claim of him who is

*certain*

*certans de damno evitando*; for, as observed above, there is in human nature a perception of wrong, where a man avails himself of an error to make profit at another's expence. Nor does the principle of utility make any distinction. It is a great object in society, to rectify the disorders of chance, and to preserve to every man, as much as possible, the fruits of his own industry; which is the same whether it has been applied to prevent loss, or to make a real accession to a man's fortune. In the cases accordingly that have occurred, I find no distinction made; and in those which follow, there was no benefit but what arose from preventing loss. A ship being ransomed from a privateer, every person benefited must contribute a proportion of the ransom \*. A written testament being voided for informality, the executor nominate was allowed the expence of confirming the testament, because to the executrix *qua* next in kin, pursuer of the reduction, it was profitable by favouring her the expence of a confirmation †.

\* Fountainhall, June 29. 1710, Ritchie contra Lord Salton.

† Fountainhall, Feb. 26. 1712, Moncrieff contra Monypenny.

From what is said, it may possibly be thought, that the foregoing rule of equity is applicable where-ever it can be subsumed, that the loss sustained by one proves beneficial to another. But this will be found a rash thought, when it is considered, that one may be benefited without being in any proper sense *locupletior* or a gainer upon the whole. I give an example. A man erecting a large tenement in a borough, becomes bankrupt by overstretching his credit. This new tenement, being the chief part of his substance, is adjudged by his creditors for sums beyond the value. In the mean time, the tradesmen and the furnishers of materials for the building, trusting to a claim in equity, forbear to adjudge. They are losers to the extent of their work and furnishings; and the adjudgers are in one sense *locupletiores*, as by means of the tenement they will draw perhaps ten shillings in the pound instead of five. Are the adjudgers then, in terms of the maxim, bound to yield this profit, in order to pay the workmen and furnishers? By no means. For here the benefit is partial only, and produceth not upon the whole  
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actual profit: on the contrary, the adjudgers, even after this benefit, are equally with their competitors *certantes de damno evitando*. The court of session accordingly refused to sustain the claim of the tradesmen and furnishers \*. Hence appears a remarkable difference between property and obligation. Money laid out upon a subject by the *bona fide possessor*, whether for melioration or to preserve it from damage, makes the proprietor *locupletior*, and a *captator lucri ex aliena jactura*. But though a creditor be benefited by another's loss, so as by that means to draw a greater proportion of his debt; he is not however a gainer upon the whole, but is still *certans de damno evitando*. And when the parties are thus in *pari casu*, a court of equity cannot interpose, but must leave them to the common law.

I add another limitation, which is not peculiar to the maxim under consideration, but arises from the very constitution of a court of equity. It is not sufficient that there be gain, even in the strictest sense: it is necessary that the gain be clear and certain;

\* Dec. 4. 1735, Burns contra creditors of Maclellan.



for otherwise a court of equity must not undertake to make up the loss out of that gain. The principle of utility, in order to prevent arbitrary proceedings, prohibits a court of equity to take under consideration a conjectural loss or a conjectural gain; because such loss or gain can never be brought under a general rule. I give the following illustrations. Two heritors having each of them a salmon-fishing in the same part of a river, are in use to exercise their rights alternately. One is interrupted for some time by a suit at the instance of a third party: the other by this means has more capture than usual, though he varies not his mode of fishing. What the one loses by the interruption, is probably gained by the other, at least in some measure. But as what is here transferred from the one to the other cannot be ascertained with any degree of certainty, a court of equity must not interpose. Again, a tenant upon the faith of a long lease, lays out considerable sums upon improving his land, and reaps the benefit a few years. But the landlord, who holds the land by a military tenure, dies suddenly in the flower of his age, leaving

leaving an infant heir: the land by this means comes into the superior's hand, and the lease is superseded during the ward. Here a great part of the extraordinary meliorations which the lessee intended for his own benefit, are converted to the use of the superior. Yet equity cannot interpose, because no general rule can be laid down for ascertaining the gain made by the superior. The following case confirms this doctrine. In an action at a tencer's instance for a third of the rents levied by the fiar, the court refused to sustain a deduction claimed by the defendant, namely, a third of the factor-fee paid by him for levying the rents; though it was urged, that the pursuer could not have levied her third at less expence \*. The loss here was not ascertained, and was scarce capable of being ascertained; for no one could say what less the factor would have accepted for levying two thirds of the rent than for levying the whole. Neither was the profit capable to be ascertained: the lady herself might have levied her share, or have got a friend to serve her *gratis*.

\* Durie, March 27. 1634, Lady Dunfermline contra her son.

I shall close with one further limitation, which regards not only the present subject, but every claim that can be founded on equity. Courts of equity are introduced in every country to enforce natural justice, and by no means to encourage any wrong. Whence it follows, that no man is intitled to the aid of a court of equity, where he suffers by his own fault. For this reason the proprietor is not made liable for the expence of profitable meliorations, but where the meliorations were made *bona fide* by a person intending his own profit, and not suspecting any hazard. It is laid down however in the Roman law, That the necessary expence laid out in upholding the subject, may be claimed by the *mala fide possessor* \*. If such reparations be made while the proprietor is ignorant of his right, and the ruin of the edifice be thereby prevented, there possibly may be a foundation in utility for the claim: but I deny there can be any foundation in justice. And therefore, if a tenant, after being ejected by legal execution, shall obstinately persist to plough and

\* l. 5. C. De rei vindic.

sow,

low, he ought to have no claim for his seed nor his labour. The claim in these circumstances hath no foundation either in justice or utility: yet the claim was sustained\*.

But there are many personal connections joined with a much slighter real connection than that above mentioned, which intitle a man to have his loss made up out of my gain. Of which take the following examples.

There are three creditors connected by their relation to the same debtor who is a bankrupt, and by their relation to two land-estates *A* and *B* belonging to the debtor, the first creditor being preferably secured on both estates, one of the secondary creditors being secured upon *A*, the other upon *B*. The catholic creditor purchases one of the secondary debts under its value, by which he is a gainer; for by his preferable debt he cuts out the other secondary creditor, and by that means draws the whole price of the two subjects. The question is, Whether equity will suffer him to retain his gain against the other

\* Stair, February 22. 1671, Gordon contra Macculloch.



secondary creditor, who is thus cut out of his security. It cannot indeed be specified here, as in the case of the *bonæ fidei possessor rei aliene*, that money given out by the one is converted to the use of the other: but then the loss and gain are necessarily connected by having a common cause, namely, the purchase made by the catholic creditor. This connection between loss and gain, joined with the personal connections above mentioned, make it the duty of the catholic creditor to communicate his profit, in order to make up the loss that the other creditor sustains. And one with confidence may deliver this opinion, when the following circumstance is added, that the loss was occasioned by the catholic creditor, in making a purchase that he was sensible would ruin his fellow-creditor.

The next case in order is of two assignees to the same bond, ignorant of each other. The cedent or assignor contrives to draw the purchase-money from both, and walks off in a state of bankruptcy. The latter assignment, being first intimated, will be preferred. But to what extent? Will it be preferred for the whole sum

sum in the bond, or only for the price paid for it? The circumstances here favour the postponed assignee, though they have not the same weight with those in the former: the material difference is, that the assignee preferred made his purchase without knowing of his competitor, and consequently without any thought of distressing him. The personal connection however, joined with the necessary connection between the loss and gain, appears sufficient to deprive the last assignee of his gain, in order to make up the loss sustained by the first. The case would be more doubtful, had the first assignment been first completed; because it may appear hard, that the intervention of a second purchaser should deprive the first of a profitable bargain. I leave this point to be ripened by time and mature deliberation. The progress of equity is slow, though constant, toward the more delicate articles of natural justice. If there appear any difficulty about extending equity to this case, the difficulty probably will vanish in course of time.

One thing is certain, that in the English court of chancery there would be no  
hesitation

hesitation to apply equity to this case. That court extends its power a great way farther; farther indeed than seems just. A stranger, for example, who purchases a prior incumbrance, can draw no more from the other incumbrancers than the sum he really paid \*: and to justify this extraordinary opinion, it is said, "That the taking away one man's gain to make up another's loss, is making them both equal." This argument, if it prove any thing, proves too much, being applicable to any two persons indifferently who have not the smallest connection, supposing only the one to have made a profitable, the other a losing bargain. There ought to be some connection to found such a demand: the persons ought to be connected by a common concern; and the loss and gain ought to be connected, so at least as that the one be occasioned by the other. The first connection only is found in this case: a stranger who purchases a prior incumbrance is indeed, by a common subject, connected with the other incumbrancers: but this purchase does not harm the other incumbrancers; for when the

\* 1. Vernon 476.

purchaser

purchaser claims the debt in its utmost extent, it is no more than what his author could do. The rule of chancery, in this view, appears a little whimsical: it deprives me of a lucrative bargain, the fruit of my own industry, to bestow it, not upon any person who is hurt by the bargain, but upon those who are in no worse condition than before the bargain was made. Neither am I clear, that this rule can be supported upon a principle of utility: for though it is preventive of hard and unequal bargains; yet as no prudent man will purchase an incumbrance on such a condition, it is in effect a prohibition of such purchases, which would prove a great inconveniency to many whose funds are locked up by the bankruptcy of their debtors.

That an heir acquiring an incumbrance should be allowed no more but what he really paid, or, which comes to the same, that he should be bound to communicate easements, is a proposition more agreeable to the principles of equity. This is the law of England \*, and it is the law of Scot-

\* 1. Salkeld 155.



land with regard to heirs who take the benefit of inventory. But the case of an heir is very different from that of a stranger. He hath in his hand the fund for payment of the creditors, which he ought faithfully to account for; and therefore he is not permitted to state any article for exhausting that fund beyond what he hath actually expended: if a creditor accepts less than his proportion, the fund for the other creditors is so much the larger.

A cautioner upon making payment obtaining an ease, must communicate the same to the principal debtor, upon a plain ground in common law, that being secure of his relief from the principal debtor, he has no claim but to be kept *indemnis*. But supposing the principal debtor bankrupt, I discover no ground other than paction, that can bind one cautioner to communicate eases to another: and yet it is the prevailing, I may say the established, opinion, That a cautioner who obtains an ease must communicate the benefit to his co-cautioner. I am aware of the reason commonly assigned, That cautioners for the same debt are to be considered as in a society, obliged to bear the loss equally.

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But this, I doubt, is arguing in a circle : they resemble a society, because the loss must be equal; and the loss must be equal, because they resemble a society. We must therefore go more accurately to work. In the first place, let us examine whether an obligation for mutual relief ought to be implied. This implication, at best doubtful, supposes the cautioners to have subscribed in a body. And therefore, to leave no room for an implied obligation, we need but suppose, that two persons, ignorant of each other, become cautioners at different times, and in different deeds. It appears, then, that common law affords not an obligation for mutual relief. The matter is still more clear with regard to equity: for the connection between two cautioners can never be so intimate, as to oblige the one who is not a gainer to make up the other's loss; which is the case of the cautioner who obtains an ease, supposing that ease to be less than that proportion of the debt which he stands bound to pay. Upon the whole, my notion is, that if a cautioner, upon account of objections against the debt, or upon account of any circumstance that regards the principal

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debtor,

debtor, obtain an ease, he is bound to communicate that ease to his fellow-cautioner, upon the following rational principle, That both cautioners ought equally to partake of an ease, the motive to which respects them equally. This appears to be the *ratio decidendi* in the case reported by Stair, July 27. 1672, Brodie contra Keith. But if upon prompt payment by one cautioner after the failure of others, or upon any consideration personal to the cautioner, an ease be given; equity, I think, obliges not the cautioner to communicate the benefit to his fellow-cautioners. And this was decreed, Stair, July 8. 1664, Nisbet contra Leslie.

There is one circumstance that, without much connection real or personal, extends to many cases the maxim, *Nemo debet locupletari aliena jactura*; and that is fraud, deceit, or any sort of wrong. If by means of a third person's fraud one gains and another loses, a court of equity will interpose to make up the loss out of the gain. And this resolves into a general rule, "That no man, however innocent, ought to take advantage of a tortious act by which another

"another is hurt." Take the following example. A second disposition of land, though gratuitous, with the first infestment, is preferred at common law before the first disposition without infestment, though for a valuable consideration. But as the gratuitous disponent is thus benefited by a moral wrong done by his author, he ought not, however innocent, to take advantage of that moral wrong to hurt the first disponent. This circumstance makes the rule applicable, *Non debet locupletari aliena jactura*; and therefore a court of equity will compel him, either to give up his right to the land, or to repair the loss the first disponent has suffered by being deprived of his purchase.

The following cases rest upon the same principle. A disposition by a merchant of his whole estate to his infant-son, without a reserved life interest or power to burden, was deemed fraudulent, in order to cheat his correspondents, foreign merchants, who had traded with him before the alienation, and continued their dealings with him upon the belief that he was still proprietor; and their claims, though posterior  
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to the disposition, were admitted to affect the estate \*.

Where a tutor acting to the best of his skill for the good of his pupil, happens, in the ordinary course of administration, to convert a moveable debt into one that is heritable, or an heritable debt into one that is moveable ; such an act, after the pupil's death, will have its effect with respect to the pupil's succession, by preferring his heir or executor, as if the act had been done by a proprietor of full age. But where the tutor acts in this manner unnecessarily, with the sole intention to prefer the heir or the executor, this is a tortious act, contrary to the duty he owes his pupil, which will affect the heir or executor, though they had no accession to the wrong. In common law the succession will take place according to the tutor's act, whether done with a right or a wrong intention ; but this will be corrected in equity, upon the principle, That no person ought to take advantage of a tortious act that harms another.

A donation *inter virum et uxorem* is re-

\* Stair, July 2. 1673, Street contra Mason.

vocable ;

vocable; but not a donation to the husband or wife's children, or to any other relation. A wife makes a donation of her land-estate to her husband; who afterward, in order to bar revocation, gives up the disposition granted to him, and instead of it takes a disposition to his eldest son. Will this disposition be revocable? Where a wife out of affection to her husband's eldest son makes a deed in his favour, it is not revocable, because it is not a *donatio inter virum et uxorem*. But in this case it is clear, that the donation was intended for the husband, and that the sole purpose of the disposition to the son was to bar revocation; which was an unlawful contrivance to elude the law. It would be wrong therefore in the son, however innocent, to take advantage of his father's tortious act, calculated to deprive the woman of her privilege; and therefore the disposition to him will be revocable in equity, as that to the father was at common law.

ART. II. *Connections that intitle a man who is not a loser, to partake of my gain.*

FOR the sake of perspicuity, this article shall be divided into two branches : 1st, Where the gain is the operation of the man who claims to partake of it. 2d, Where he has not contributed to the gain.

I introduce the first branch with a case which will be a key to the several matters that come under it. Two heirs-portioners, or in general two proprietors of a land-estate *pro indiviso*, get for a farm a rent of eighty pounds yearly; and an offer of ten pounds additional rent if they will drain a lake in it. John is willing; but James refuses, judging it impracticable, or at least too expensive. John proceeds at his own risk; and for the sum of L. 100 drains the lake. He cannot specify any loss by this undertaking; because the sum he laid out is fully compensated by the five pound additional rent accruing to him: and therefore the maxim, *Nemo debet locupletari aliena jactura*, is not applicable to his

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his case. But James is a profiter, not only by John's advancing the money, but at his risk; for if the undertaking had proved abortive, John would have lost both his labour and money. Is it just that James should be permitted to lay hold of an additional rent of L. 5, without defraying any part of the expence? He cannot justify this to his own conscience, nor to the world. The moral sense dictates, that where expence is laid out in improving or repairing a common subject, no one ought to take the benefit, without refunding a part of the expence in proportion to the benefit received.

This leads to a general rule, That expence laid out upon a common subject, ought to be a burden upon the benefit procured. And this rule will hold even against the dissent of any of the parties concerned; for they cannot in conscience take the benefit without the burden. A dissent cannot have any effect in equity, but only to free the person dissenting from any risk.

The following cases come clearly under the same general rule. One of three joint proprietors of a mill, having raised a decla-



rator of thirlage, and, notwithstanding a disclamation by the others, having insisted in the process till he obtained a decree; the others who reaped the profit equally with him, were made liable for their share of the expence \*. And one of many co-creditors having obtained a judgement against the debtor's relict, finding her liable to pay her husband's debts; the other creditors who shared the benefit were decreed to contribute to the expence †. For the same reason, where a tenement destroyed by fire was rebuilt by a liferenter, the proprietor, after the liferenter's death, was made liable for the expence of rebuilding, as far as he was *lucratus* thereby ‡. And if rebuilt by the proprietor, the liferenter will be liable for the interest of the sum expended as far as he is *lucratus* §. Action was sustained at the instance of a wadsetter for declaring, that his intended reparation of a harbour in the wadset-lands, would be profitable to the re-

\* Stair, January 6. 1676, Forbes contra Ross.

† Bruce, July 30. 1715, Creditors of Calderwood contra Borthwick.

‡ Forbes, Feb. 20. 1706, Halliday contra Garden.

§ Stair, Jan. 24. 1672, Haket contra Watt.

verfer; and that the reverfer, upon redemption, -fhould be bound to repay the expence thereof \*. Upon the fame principle, if a leffee erect any buildings by which the proprietor is evidently *lucratus* at the end of the leafe, there is a claim in equity for the expence of the meliorations. But reparations, though extenfive, will fcarce be allowed where the leffee is bound to uphold the houfes; becaufe a leffee who beftows fuch reparation without his landlord's confent, is underftood to lay out his money in order to fulfil his obligation, without any profpect of retribution †. The prefent minifter was found not liable for the meliorations of the glebe made by his predeceffor ‡. But what if meliorations be made, inclofing, draining, ftorning, &c. which are clearly profitable to all future poffeffors? If the expence of thefe, in proportion to the benefit, be not in fome way refunded, glebes will reft in their original ftate for ever. I do not fay,

\* Durie, July 22. 1626, Morifon contra Earl of Lothian.

† Gilmour, Feb. 1664, Hodge contra Brown.

‡ Nicolfon, (Kirkmen), June 14. 1623, Dunbar contra Hay.

that the minister immediately succeeding ought to be liable for the whole of this expence : for as the benefit is supposed to be perpetual, the burden ought to be equally so : which suggests the following opinion, That the sum-total of the expence ought to be converted into a perpetual annuity, to be paid by the ministers of this parish ; for the only equitable method is, to make each contribute in proportion to the benefit he receives.

The following case belongs undoubtedly to the maxim of equity under consideration ; and yet was judged by common law, neglecting the equitable remedy. In a shipwreck, part of the cargo being saved, was delivered to the owners for payment of the salvage. The proprietor of the ship claiming the freight of the goods saved *pro rata itineris*, the freighters admitted the claim ; but insisted, that as the salvage was beneficial to him on account of his freight, as well as to them on account of their goods, he ought to contribute a share. His answer was sustained to free him from any part, That the expence was wholly laid out on recovering the freighter's goods ; and therefore that they only



only ought to be liable \*. The answer here sustained resolves into the following proposition, That he only is liable whose benefit is intended : which holds not in equity ; for at that rate, the *bona fide possessor*, who in meliorating the subject intends his own benefit solely, has no claim against the proprietor. Here the freighters and the proprietor of the ship were connected by a common interest : the recovering the goods from shipwreck was beneficial to both ; to the freighters, because it put them again in possession of their goods ; and to the proprietor of the ship, because it gave him a claim for freight. The salvage accordingly was truly *in rem versum* of both ; and for that reason ought to be paid by both in proportion to the benefit received. This case may be considered in a different light that will scarce admit a dispute. Suppose that the owners of the cargo, in recovering their goods to the extent of L. 1000, have laid out L. 100 upon salvage : they have in effect saved or recovered but L. 900 ; and beyond that sum they cannot be liable for the freight : which in numbers

\* January 18. 1735, Lutwich contra Gray.



will bring out a greater sum than what results from the rule above mentioned.

It will not escape the reader, that equity is further extended in this branch than in the former; and he will also discover a solid reason for the difference. With respect to matters contained in the former branch, the real connection is only, that what is lost by the one is gained by the other; as in the case of a *bona fide possessor rei alienæ*. But the real connection in the present branch is so far more intimate, that every acquisition must benefit all equally, and every loss burden all equally.

It appears, that a benefit accruing to another by my labour, occasionally only, not necessarily, will not intitle me to a claim where I am not a loser. To make the truth of this observation evident, a few examples will be sufficient. A drain made by me in my own ground for my own behoof, happens to discharge a quantity of water that stagnated in a superior field belonging to a neighbour. Justice does not intitle me to claim from this neighbour any share of the expence laid out upon the drain. The drain has answered my intention, and overpays the sum bestowed

stowed upon it: therefore my case comes not under the maxim, *Nemo debet locupletari aliena jactura*. Neither can I have any claim upon the rule, That expence laid out upon a common subject ought to be a burden upon the benefit procured; for here there is no common subject, but only another person accidentally or occasionally benefited by an operation intended solely for my own benefit. And Providence has wisely ordered that such a claim should have no support from the moral sense; for as there can be no precise rule for estimating the benefit that each of us receives from the drain, the subjecting my neighbour to a claim would tend to create endless disputes between us. For the same reason, if my neighbour in making an inclosure take advantage of a march-fence built by me, he will not be liable to any part of the expence bestow'd by me upon it; because the benefit, as in the former case, is occasional only or consequential.

From the nature of the claim handled in the present branch, it follows, that if the party against whom the claim is laid,  
renounce

renounce the benefit, he cannot be subjected to the burden.

With respect to the branch now handled, the circumstance that the benefit accruing to another was occasioned by my means, is the connection that intitles me to a proportion of the sum I laid out in procuring that benefit. But with respect to the second branch, which we are next to enter upon, it must require some personal relation extremely intimate to intitle me to partake of another man's profit when I have not contributed to it. And this will be made evident by the following examples.

When land is held ward, and the superior is under age, a gift of his ward is effectual against his vassal as well as against himself. But where the gift of ward was taken for behoof of the superior, it was the opinion of the court, that the vassal also had the benefit thereof upon paying his proportion of the composition \*. Against this opinion it was urged, That a vassal must reckon upon being liable to all the casualties arising from the nature of

\* Dirleton, December 1. 1676, Grierson contra Ragg.

his right ; and that there is no reason for limiting the superior's claim, more than that of any other donatar. But it was answered, That the relation between superior and vassal is such, as that the superior cannot *bona fide* take advantage against his vassal of a casualty occasioned by his own minority. The same rule was applied to a gift of marriage taken for behoof of the superior \*. And it appearing that the superior had obtained this gift for alleged good services, without paying any composition, the benefit was communicated to the vassal without obliging him to pay any sum †.

If a purchaser of land, discovering a defect in the progress, secure himself by acquiring the preferable title ; common law will not permit him to use this title as a ground of eviction, and to make his author, bound in absolute warrandice, liable for the value of the subject : for the purchaser is not intitled to the value unless the land be evicted from him ; and therefore he cannot have any claim upon the

\* Harcase, (Ward and Marriage), Jan. 1636, Drummelzier contra Murray of Stanhope.

† Ibid.



warrandice beyond the sum he paid for the title. This point is still more clear upon the principle of equity above mentioned. The connection is so intimate between a purchaser, and a vender bound in absolute warrandice, that every transaction made by either, with relation to the subject purchased, is deemed to be for behoof of both.

But now supposing several parcels of land to be comprehended under one title-deed. One parcel is sold with absolute warrandice; and the purchaser, discovering the title-deed to be imperfect, acquires from a third party a preferable title to the whole parcels. He is no doubt bound to communicate the benefit of this acquisition to the vender, as far as regards the parcel he purchased. But there is nothing at common law to bar him from evicting the other parcels from the vender. Whether a relief can be afforded in equity, is doubtful. The connection between the parties is pretty intimate: the purchaser is bound to communicate to the vender the benefit of his acquisition with respect to one parcel, and it is natural to extend the same benefit to the whole. One case  
of

of this nature occurred in the court of session. A man having right to several subjects contained in an adjudication, sold one of them with absolute warrandice; and the purchaser having acquired a title preferable to his author's adjudication, claimed the subjects that were not disposed to him. The court restricted the claim to the sum paid for the preferable title \*. It is not certain whether this decree was laid upon the principle above mentioned: for what moved some of the judges was the danger of permitting a purchaser acquainted with the title-deeds of his author, to take advantage of his knowledge by picking up preferable titles; and that this, as an unfair practice, ought to be prohibited.

ART. III. *Connections that intitle one who is a loser to be indemnified by one who is not a gainer.*

CASES daily occur, where, by absence, infancy, inadvertence, or other circum-

\* February 21. 1741, James Drummond contra Brown and Miln.

stances, effects real or personal are left without proper management, and where ruin must ensue, if no person of benevolence be moved to interpose. Here friendship and good-will have a favourable opportunity to exert themselves, and to do much good, perhaps without any extraordinary labour or great expence; and when a proprietor is benefited by such acts of friendship or benevolence, justice and gratitude claim from him a retribution, to the extent at least of the benefit received. Here the maxim, *Nemo debet locupletari aliena jactura*, is applicable in the strictest sense. Hence the *actio negotiorum gestorum* in the Roman law, which for the reason given is adopted by all civilized nations.

But what if this friendly man, after bestowing his money and labour with the utmost precaution, happen to be unsuccessful? What if, after laying out his money profitably upon repairing houses or purchasing cattle for my use, the benefit be lost to me by the casual destruction of the subject; would it be just that this friend, who had no view but for my interest, should run the risk? As there was

no

no contract between us, a claim will not be sustained at common law for the money expended. But equity pierces deeper, in order to fulfil the rules of justice. Service undertaken by a friend upon an urgent occasion, advances gratitude from a virtue to be a duty; and binds me to *recompense* my friend as far as he has laid out his own money in order to do me service. The moral sense teaches this lesson; and no person, however partial in his own concern, but must perceive this to be the duty of others. Utility also joins with justice to support this claim of recompence. Men ought to be invited to serve a friend in time of need: but instead of invitation, it would be a great discouragement, if the money advanced upon such service were upon their own risk, even when laid out with the greatest prudence (a). This doctrine

(a) The Roman writers found this duty upon their *quasi*-contracts, of which *negotiorum gestio* is said to be one. And to understand this foundation, the nature of *quasi*-contracts must be explained. In human affairs certain circumstances and situations frequently happen that require a covenant, which nothing can prevent but want of opportunity. The present case affords a good illustration. A sudden call



trine is laid down by Ulpian in clear terms : “ Is autem, qui negotiorum gestorum agit, non solum si effectum habuit negotium quod gessit, actione ita utetur : sed sufficit, si utiliter gessit, etsi effectum non habuit negotium. Et ideo, si insulam fulsit, vel servum agrum curavit, etiamsi insula exusta est, vel servus obiit, ager negotiorum gestorum. Idque et Labeo probat \*.”

From what is said above it is evident, call forces me abroad, without having time to regulate my affairs : disorder ensues, and a friend undertakes the management. Here nothing prevents a mandate but want of opportunity ; and it is presumed that the mandate would not have been wanting, had I known the good intentions of my friend. Equity accordingly holds the mandate as granted, and gives the same actions to both that the common law gives in pursuance of a mandate. Though this serves to explain the Roman *quasi* contracts, yet it seems a wide stretch in equity to give to a supposition the effects of a real contract ; especially without any evidence that the person who undertakes the management would have been my choice. But I have endeavoured to make out in the text, that this claim for recompence has a solid foundation in justice, and in human nature, without necessity of recurring to the strained supposition of a contract.

\* l. 10. § 1. Negot. gest.

that

that the man who undertakes my affairs, not to serve me, but to serve himself, is not intitled to the *actio negotiorum gestorum*. Nor, even supposing me to be benefited by his management, is he intitled to have his loss repaired out of my gain : for wrong can never found any claim in equity. Yet Julianus, the most acute of the Roman writers, answers the question in the affirmative. Treating of one who *mala fide* meddles in my affairs, he gives the following opinion : “ Ipse tamen, si circa res  
 “ meas aliquid impenderit, non in id quod  
 “ ei abest, quia improbe ad negotia mea  
 “ accessit, sed in quod ego locupletior factus sum, habet contra me actionem \*.” It appears at the same time, from *l. ult. C. De negot. gest.* that this author was of a different opinion, where the management of a man’s affairs was continued against his will ; for there no action was given. This, in my apprehension, is establishing a distinction without a difference : for no man can hope for my consent to continue the management of my affairs, when he begun that management, not to serve me, but with a view to his own interest. A

\* l. 6. § 3. De negot. gest.

prohibition involved in the nature of the thing, is equivalent to an express prohibition.

The master of a ship, or any other, who ransoms the cargo from a privateer, is, according to the doctrine above laid down, intitled to claim from the owners of the cargo the sum laid out upon their account: they profit by the transaction, and they ought to indemnify him. But what if the cargo be afterward lost in a storm at sea, or by robbery at land? The owners are not now profitters by the ransom, and therefore they cannot be made liable upon the maxim, *Nemo debet locupletari aliena jactura*. They are however liable upon the principle here explained. The moment the transaction was finished they became debtors to the ransomer for the sum he laid out profitably upon their account. He did not undertake the risk of the cargo ransomed; and therefore the casual loss of the cargo cannot have the effect to deprive him of his claim.

The *lex Rhodia de jactu*, a celebrated maritime regulation, has prevailed among all civilized nations ancient and modern. Where in a storm weighty goods of little value

value are thrown overboard to disburden the ship, the owners of the remaining cargo must contribute to make up the loss. This case, as to the obligation of retribution, is of the same nature with that now mentioned, and depends on the same principle. The throwing overboard weighty goods of little value, is beneficial to the owners of the more precious goods, which by that means are preserved; and, according to the foregoing doctrine, these owners ought to contribute for making up the loss of the goods thrown into the sea, precisely as if there had been a formal covenant to that effect. But what if the whole cargo be afterward lost, by which eventually there is no benefit? If lost at sea in the same voyage, the owner of the goods thrown overboard has certainly no claim; because at any rate he would have lost his goods along with the rest of the cargo. But as soon as the cargo is laid upon land, the obligation for retribution is purified; the value of the goods abandoned to the sea, is or ought to be in the pocket of the owner; and the delay of payment will not afford a defence against him,



whatever becomes of the cargo after it is landed.

It is a question of greater intricacy, Whether the goods saved from the sea ought to contribute according to their weight or according to their value. The latter rule is espoused in the Roman law :

“ Cum in eadem nave varia mercium genera complures mercatores coegissent, prætereaque multi vectores, servi, liberi- que in ea navigarent, tempestate gravi orta, necessario jactura facta erat. Quæ- sita deinde sunt hæc : An omnes jacturam prestare oporteat, et si qui tales merces imposuissent, quibus navis non oneraretur, velut gemmas, margaritas ? et quæ portio præstanda est ? Et an etiam pro liberis capitibus dari oporteat ? Et qua actione ea res expediri possit ? Placuit, omnes, quorum interfuisset jacturam fieri, conferre oportere, quia id tributum observatæ res deberent : itaque dominum etiam navis pro portione obligatum esse. Jacturæ summam pro rerum pretiis distribui oportet. Corporum liberorum æstimationem nullam fieri posse \*.” This rule is adopted

\* l. 2. § 2. De lege Rhodia de jactu,

by all the commercial nations in Europe, without a single exception, as far as I can learn. And in pursuance of the rule, it is also adopted, That the owner of the ship ought to contribute, because the shipwreck being prevented by throwing overboard part of the cargo, his claim for freight is preserved to him. " Thus, if, in stress of weather, or in " danger and just fear of an enemy, goods " be thrown overboard, in order to save " the ship and the rest of the cargo, that " which is saved shall contribute to repair that which is lost, and the owners " of the ship shall contribute in proportion \*."

These authorities notwithstanding, to which great regard is justly due, it is not in my power to banish an impression, That the rule of contribution ought to be weight, not value. In every case where a man gives away his money or his goods for behoof of a plurality connected by a common interest, two things are evident: first, That his equitable claim for a recompence cannot exceed the loss he has sustained;

\* Shower's Cases in parliament 19.

and next, That each individual is liable to make up the loss of that part which was given away on his account. When a ransom is paid to a privateer for the ship and cargo, a share of the money is understood to be advanced for each proprietor, in proportion to the value of his goods; and that share each must contribute, being laid out on his account, or for his service. That the same rule is applicable where a ship is saved by abandoning part of its cargo, is far from being clear. Let us proceed warily, step by step. The cargo in a violent storm is found too weighty for the ship, which must be disburdened of part, let us suppose the one half. In what manner is this to be done? The answer would be easy, were there leisure and opportunity for a regular operation: each person who has the weight of a pound aboard, ought to throw the half into the sea; for one person is not bound to abandon a greater proportion than another. This method, however, is seldom or never practicable; because in a hurry the goods at hand must be heaved over: and were it practicable, it would not be for the common interest to abandon goods of little weight

weight and great value, along with goods of great weight and little value. Hence it comes to be the common interest, and, without asking questions, the common practice, to abandon goods the value of which bears no proportion to their weight. This, as being done for the common interest, intitles the proprietors of these goods to a recompence from those for whose service the goods were abandoned. Now the service done to each proprietor is, instead of his valuable goods, to have others thrown overboard of a meaner quality; and for such service all the recompence that can be justly claimed is the value of the goods thrown overboard. Let us suppose with respect to any owner in particular, that regularly he was bound to throw overboard twenty ounces of his goods: all that he is bound to contribute, is the value of twenty ounces of the goods that in place of his own were actually thrown overboard. In a word, this shorthand way of throwing into the sea the least valuable goods, appears to me in the same light, as if the several owners of the more valuable part of the cargo, had each of them purchased a quantity of the mean goods



goods to be thrown into the sea instead of their own.

I must observe at the same time, that the doctrine of the Roman law appears very uncouth in some of its consequences. Jewels, and I may add bank-bills, are made to contribute to make up the loss, though they contribute not in any degree to the distress; nor is a single ounce thrown overboard upon their account: nay, the ship itself is made to contribute, though the *jactura* is made necessary, not by the weight of the ship, but by that of the cargo. On the other hand, passengers are exempted altogether from contributing, for a very whimsical reason, That the value of a free man cannot be estimated in money: and yet passengers frequently make a great part of the load. If they contribute to the necessity of disburdening the ship, for what good reason ought they to be exempted from contributing to make up the loss of the goods thrown into the sea upon their account?

Under this article comes a case that appears to be *in apicibus juris*. A bond extinguished by payment is assigned for a valuable consideration, and the assignee, ignorant

ignorant of the payment, obtains payment a second time from the debtor's heir. After several years the error is discovered, but the cedent by this time has become bankrupt. The heir is at common law entitled to demand from the assignee the sum he paid; as twice payment can have no support in law. The assignee paying this sum is barred by the insolvency of the cedent from any relief against him. What does equity rule in this intricate case, where there is a real connection between the parties by their concern in the same subject? A strong circumstance for the assignee is, that the payment he received from the heir *bona fide*, was to him invincible evidence, that he could have no claim against the cedent. He was led into that mistake by the heir's remissness or rather rashness in paying without examining his father's writings. They are equally *certantes de damno vitando*; and yet the heir's claim at common law must be sustained, if there be nothing in equity to balance it. The balance in equity is, that the loss ought to rest on the heir, by whose remissness it was occasioned, and not on the assignee, who had it not in his power  
to

to prevent it. But as the assignee's loss is only the price he paid to the cedent, his equitable defence against the heir can go no further. This principle of equity is acknowledged by the court of session, and has been frequently applied. Thus an heir having ignorantly paid a debt to an assignee, and several years after having discovered that his ancestor had paid the debt to the cedent, he insisted in a *condictio indebiti*. The defendant was affoizied, because the cedent had become insolvent after the erroneous payment\*. In this case it seems to have been overlooked, that the assignee was not intitled to withhold from the heir more than what he himself had paid to the cedent. So far he was *certans de damno vitando*: to demand more was *captare lucrum ex aliena jactura*. A creditor, after receiving a partial payment, assigned the whole sum for security of a debt due by him to the assignee; who having got payment of the whole sum from the debtor, ignorant of the partial payment, was on discovery of the fact sued for restitution *condictione in-*

\* 24th July 1723, Duke of Argyle contra Representatives of Lord Halcraig.

*debiti*. His defence was sustained, That he was not bound to restore what he received in payment of a just debt \*. This judgement is founded on a mistake in fact. The debt due to the assignee by the cedent was a just debt ; but the sum paid by the debtor to the assignee was not in payment of that debt, but of the debt due by him to the cedent, which was not wholly just, as part had been formerly paid. The debtor therefore was well intitled to demand the overplus from the assignee, because a second payment can have no support from law. But probably the cedent had become insolvent after the erroneous payment, which brings this case under the rule of equity handled above.

\* Stair, 23d February 1681, Earl Mar contra Earl Callender.



## C H A P. IV.

Powers of a court of equity to remedy what is imperfect in common law with respect to deeds and covenants.

WE have seen above, that, abstracting from positive engagements, the affording relief to a fellow-creature in distress, is the only case that exalts our benevolence to be an indispensable duty. A man however is singly the most helpless of all animals; and unless he could rely upon assistance from others, he would in vain attempt any work that requires more than two hands. To secure aid and assistance in time of need, the moral sense makes the performance of promises and covenants a duty; and to these accordingly may justly be attributed, the progress at least, if not the commencement, of every art.

Among the various principles that qualify men for society, that by which one man can

can bind himself to another by an act of will, is eminent. By that act, a new relation arises between them: the person bound is termed *obligor*, the other *obligee*. But a man may exert an act of will in favour of another without binding himself, which is the case of a testament or latter-will: during the testator's life, his will expressed in his testament, differs not from a resolution, as he is bound by neither; but after death it differs widely, for death puts an end to the power of alteration. A testament therefore must be effectual by the testator's death, or it never can be effectual.

Where two persons bind themselves to each other by mutual acts of will, this is termed a *contract* or *covenant*. Where one binds himself to another without any reciprocal obligation, that act of will is termed a *promise*. I promise to pay to John L. 100. An *offer* is a different act of will: it binds not unless it be accepted; and acceptance is an act of will of a fourth kind. Where one by an act of will conveys a subject to another, that is a fifth kind; and that act expressed in writing is termed a *deed*.

Nature, independent of will, bars absolutely men from harming each other. It binds them positively to afford relief to the distressed as far as they are able. But in no case is a man bound to add to the estate of another, or to make him *locupletior*, as termed in the Roman law, otherwise than by voluntary engagement. This distinguishes the obligation of a voluntary engagement from the other duties mentioned. The latter cannot be transgressed without making others suffer in person, in goods, or in reputation: but in relieving from the obligation of a promise or covenant, the person in whose favour it is made, is indeed deprived of any benefit from it, but suffers no positive loss or damage: to him it is *lucrum cessans* only, not *damnum datum*. Hence it is, that the moral sense is less rigid as to voluntary engagements, than as to duties that arise without consent. To fulfil a rational promise or covenant, is a duty no less inflexible than to fulfil the duties that arise without consent. But as man is a fallible being, liable to fraud and deceit, and apt to be misled by ignorance and error, the moral sense would be ill suited to his nature,

ture, did it compel him to fulfil every engagement, however irrational, however rashly or ignorantly made. Deplorable indeed would be our condition, were we so strictly bound by the moral sense: the innocent would be a prey to the designing, the ignorant would be over-reached by the crafty, and society be an uncomfortable state. But the author of our nature leaves none of his works imperfect: the moral sense, corresponding to the fallibility of our nature, binds us by no engagement but what is fairly entered into with every consequence in view, and what in particular answers the end for which it was made.

Few persons pass much of their time without having purposes to fulfil, and plans to execute; for accomplishing which, means are employ'd. Among these means, deeds and covenants make a capital figure; no man binds himself or others for the sake merely of binding, but in order to bring about a desired event. Every deed and covenant may accordingly be considered to be a mean employed to bring about some end or event.

Sometimes the desired event is mentioned



ed in the deed or covenant, and expressly agreed on to be performed; in which case performance concludes the transaction, being all that was intended. A bond for borrowed money is a proper example; what is stipulated in the bond to be performed, is repayment of the money, beyond which the parties have no view; and that end is accomplished when the money is repaid. A legacy bequeathed in a testament is another example: payment of the legacy is the only end in view; and that end is accomplished when the legatee receives the money. But in many deeds and contracts, the fact appointed to be done, is not ultimate, but intended to bring about a further end. Thus, when I buy a stone horse for propagation, the contract is performed upon delivery of the horse to me. But this performance does not fulfil my purpose: I have a further end in view, which is to breed horses; and unless the horse be fit for that end, my purpose in contracting is frustrated. I purchase a hoghead of flax-seed for raising a crop of flax. It is not enough that the seed be delivered to me: if it be rotten,

rotten, the end I have in view is disappointed.

This suggests a division of voluntary engagements into two kinds: the first, where the performance mentioned is ultimate by fulfilling all that was intended; the other, where the performance mentioned is not ultimate, but intended as a mean to a further end, not mentioned. In this kind, a contract is a mean to bring about the immediate end, namely, the performance of what was mentioned and agreed on; and this immediate end is a mean to bring about the ultimate end.

In contracts of this kind, there is place for judging how far the means are proportioned to the end: they may be insufficient to bring about the end; they may be more than sufficient; and they may have no tendency to bring about the end. Here equity may interpose, to vary these means in some cases, and to proportion them more accurately to the ultimate end: in other cases, to set aside the contract altogether, as insufficient to bring about the ultimate end. Hence it is, that such contracts are termed *contracts bonæ fidei*; that is, contracts in which equity may interpose

pose to correct inequalities, and to adjust all matters according to the plain intention of the parties. With respect to contracts where the performance stipulated is the ultimate end, there is evidently no place for the interposition of equity; for what defence can a man have, either in law or in equity, against performing his engagement, when it fulfils all that he had in view in contracting? Contracts accordingly of that kind, are termed *contractus stricti juris*.

To the distinction between contracts *bonæ fidei* and *stricti juris*, great attention is given in the Roman law. We are told, that equity may interpose in the former, and that the latter are left to common law. But as to what contracts are *bonæ fidei*, what *stricti juris*, we are left in the dark by Roman writers. Some of their commentators give us lists or catalogues; but they pretend not to lay down any precise rule by which the one kind may be distinguished from the other. I have endeavoured to supply that defect: whether satisfactorily or not, is the province of others to judge.

Have we in Scotland any action similar  
 I to

to what ~~in~~ the Roman law is termed *Condictio ex penitentia*? Voet, upon the title *Condictio causa data*, &c. says, that the *condictio ex penitentia* is not admitted in modern practice, because every paction is now obligatory. I admit, that every paction is obligatory so far as to produce an action; but that does not bar an equitable defence. And it appears to me, that there are contracts where repentance may be sustained in equity as a good defence; as where the contract is of a deep concern to one of the parties, and of very little to the other. For example, I bargain with an undertaker to build me a dwelling-house for a certain sum, according to a plan concerted. Before the work is begun, the plan is discovered to be faulty in many capital articles. Am I bound notwithstanding to fulfil my covenant with the undertaker? Will not ignorance here relieve me, as error would do, where it is *lucrum cessans* only to the undertaker, and a very deep loss to me? Suppose again, that upon a more narrow inspection into my finances, the sum agreed on for building is found to be more than I ought to afford. Or what if, *rebus integris*, I suc-



ceed to an estate with a good house upon it, or am invited by an employment to settle elsewhere? If I be relieved, the undertaker is at liberty to accept of employment from others; and perhaps of more beneficial employment than mine: if I be kept bound, a great interest on my side is sacrificed to a trifling interest on his. Covenants, intended for the support of society, ought not rashly to be converted to the ruin of an individual. It is a delicate point to determine in what cases a court of equity ought to interpose. All arbitrary questions are dangerous, and this is one of them. The court of session, however, must not decline such questions where it is to relieve from deep inequality and distress. In the cases above mentioned, they certainly would not refuse to interpose.

Great interest on the one side, and very little on the other, is not the only instance where a court of equity will admit of repentance. Of all articles of commerce, that of land is of the highest importance. For that reason, repentance is permitted in a verbal bargain of land, however fair and equal the bargain may be. It requires writing

writing to fix the bargain. Marriage is a contract still more important, as the happiness of one's whole life may depend on it. Hence it is that nothing but a contract *de presenti* can bind. Repentance is permitted of every agreement that can be made about a future marriage. Thus a bond granted by a woman to marry the obligee under a penalty, will not be effectual even for the penalty\*.

This chapter, consisting of many parts, requires many divisions; and in the divisions that follow a proper arrangement is studied, which ought to be a capital object in every didactic subject.

## S E C T. I.

*Where will is imperfectly expressed in the writing.*

**I**N applying the rules of equity to deeds and covenants, what comes first under consideration is, whether the will be fully

\* 2. Vernon 102.

or fairly taken down in the writing. A man, expressing his thoughts to others, is not always accurate in his terms; neither is the writer always accurate in expressing the will of his employer: and between the two, errors are often multiplied. Thus, clauses in writings are sometimes ambiguous or obscure, sometimes too limited, sometimes too extensive. As in common law the words are strictly adhered to, such imperfections are remedied by a court of equity. It admits words and writing to be the proper evidence of will; but excludes not other evidence. Sensible that words and writing are not always accurate, it endeavours to reach will, which is the substantial part; and if, from the end and purpose of the engagement, from collateral circumstances, or from other satisfying evidence, will can be ascertained, it is justly made the rule, however it may differ from the words. The sole purpose of the writing is to bear testimony of will; and if that testimony prove erroneous, it can avail nothing against the truth. This branch of equitable jurisdiction, which comprehends both deeds and covenants, is founded on the principle

principle of justice, which declares for-  
will against every erroneous evidence of it.

This section may be divided into three  
articles. First, Where the words leave us  
uncertain about will. Second, Where they  
are short of will. Third, Where they go  
beyond it.

ART. I. *Where the words leave us uncertain  
about will.*

THIS imperfection may be occasioned  
by the fault of the writer, mistaking the  
meaning of his employer; or by the fault  
of the employer, exerting an act of will  
imperfectly, or expressing his will obscure-  
ly. But I purposely neglect these distinc-  
tions; because in most of the cases that  
occur, it is extremely doubtful upon whom  
the inaccuracy is to be charged. Nor will  
this breed any confusion; for from what-  
ever cause the doubt about will arises,  
the method of solving it is the same, name-  
ly, to form the best conjecture we can, af-  
ter considering every relative circum-  
stance.

Contracts



Contracts shall furnish the first examples. In a bargain of sale, the price is referred to a third person: the referee dies suddenly without naming the price; and there is no performance on either side. There being no remedy here at common law, because the price is not ascertained, can a court of equity supply the defect in order to validate the bargain? This question depends on what the parties intended by the reference. If they intended not to be bound but by the opinion of the referee, it is in effect a conditional bargain, never purified, which no court will make effectual. But if it was intended, that the sale should in all events stand good, leaving only the price to be determined by the referee; the unexpected accident of his death cannot resolve the bargain; upon which account, it belongs to a court of equity, in place of the referee, to name a price *secundum arbitrium boni viri*. A man having purchased land, obliged himself in a backbond to redispone, upon receiving back the price from the vender within a time specified. The vender having died within the time, it was questioned, Whether his heir was privileged to redeem the land,

land. If it was the meaning of the contract to confine the privilege of redemption to the vender personally, his heir could have no right. But if it was understood sufficient that the price should be repaid within the time specified, the heir was intitled to redeem, as the predecessor was. This construction, as the more equal and rational, was adopted by the court of session. And accordingly, the land was found legally redeemed, upon the heir's offering the price before the term was elapsed \*. A gentleman having given a bond of provision to his sister for 3000 merks, took from her a backbond, importing, "That the sum being rather too great for his circumstances, she consented that the same should be mitigated by friends to be mutually chosen, their mother being one." After the mother's decease without mitigation, the brother's creditors insisting for a mitigation *secundum arbitrium boni viri*, the defence was, That the condition of the mitigation had failed by the mother's death; and therefore that the bond must subsist

\* Stair, 9th January 1662, Earl of Moray contra Grant.

*in totum.* The defence was sustained \*. Supposing the backbond to be conditional, the judgement is right. But as it seems the more natural construction, that there should be a mitigation if the brother's circumstances required it, the unexpected death of the mother ought not to have prevented the mitigation.

The next examples shall be of deeds. The minister of Weem settled his funds upon five trustees, and their successors, for the use of the schoolmasters of that parish, declaring the major part to be a quorum. Two only of the trustees having accepted and intermeddled with the funds, a process was brought against them by the representatives of the minister, claiming the funds upon the following ground, That the deed of mortification was conditional, requiring the acceptance of a quorum at least of the trustees; and therefore void, the condition not having been purified. The defence was, That the deed of mortification was pure, vesting a right in the schoolmasters of Weem; that the nomination of trustees was only

\* 19th February 1734, Corfan contra Maxwell of Barn-cluch.

intended, like the nomination of an executor, to make the funds effectual; and that it was not intended to make the deed depend on their acceptance or non-acceptance. The deed was sustained; the court being of opinion, that it would have been effectual though all the trustees had declined acceptance \*. I illustrate this by an opposite case, where it was understood that no right was created by the deed. Lady Prestonfield made a settlement of considerable funds, to Sir John Cunninghame her eldest son, and Anne Cunninghame her eldest daughter, as trustees for the ends and purposes following. First, the yearly interest to be applied for the education and support of such of her descendants as should happen to be in want or stand in need thereof, and that at the discretion of the trustees. Second, failing descendants, the capital to return to her heirs. The trustees declining to accept this whimsical settlement, a process for voiding it was brought by the heir at law, in which were called all the existing descendants of the

\* December 1752, Campbell contra Campbell of Monzie and Campbell of Achallader.



maker. As here it appeared to be the maker's will to leave all to the discretion of the trustees, without the least hint of giving any right to her descendants independent of the trustees, the deed was declared void by their non-acceptance \*.

Colonel Campbell being bound in his contract of marriage to secure the sum of 40,000 merks, and the conquest during the marriage, to himself and spouse in conjunct fee and liferent, and to the children to be procreated of the marriage in fee, did by a deathbed-deed settle all upon his eldest son, burdened with the sum of 30,000 merks to his younger children, to take place if their mother could be prevailed on to give up her claim to the liferent of the conquest, and restrict herself to a less jointure : otherwise [the provision to the younger children to be void ; in which event, it was left upon the Duke of Argyle and Earl of Ilay to name such provisions to the children as they should see convenient. The referees having declined to accept, the question occurred between the heir and the younger children, What

\* 22d January 1758, Sir Alexander Dick contra Mrs Fergusson and her children,

was the Colonel's intention, whether to make a provision for his younger children, referring the quantum only to the Duke and Earl; or to make the provision conditional, that it should not be effectual unless the referees named a sum. The court adopted the latter construction; and refused to interpose in place of the referees to name a sum \*. The judgement probably would have been different, had no provision been made for the children in the contract of marriage.

A married woman gives a security on her estate to her husband's creditors; but with what intention it is not said. If a donation was intended, she has no claim for relief against her husband: but *in dubio*, a cautionary engagement will be presumed; which affords her a claim †. A court of common law would hardly be brought to sustain a claim of this nature, where there is no clause in the deed on which it can be founded.

\* 22d December 1739, Campbell contra Campbells.

† Stair, 11th January 1679, Bowie contra Corbet; Fountainhall, 16th July 1696, Leishman contra Nicols; 29th November 1728, Trail of Sabae contra Moodie.

Where a man provides a sum to his creditor, without declaring it to be in satisfaction, it will be sustained as a separate claim at common law. But as the granter probably intended that sum to be in satisfaction, according to the maxim, *Quod debitor non presumitur donare*, a court of equity, supplying a defect in words, decrees the sum to be in satisfaction. Thus, a man being bound for L. 10 yearly to his daughter, gave her at her marriage a portion of L. 200. Decreed, That the annuity was included in the portion \*. But where a man leaves a legacy to his creditor, this cannot be constructed as satisfaction; for in that case it would not be a legacy or donation.

Anthony Murray, *anno* 1738, made a settlement of his estate upon John and Thomas Belscheses, taking them bound, among other legacies, to pay L. 300 Sterling to their sister Emilia, at her marriage. Anthony altered this settlement *anno* 1740, in favour of his heir at law; obliging him, however, to pay the legacies contained in the former settlement. In the year 1744, Anthony executed a bond to Emilia upon

\* Tothill's Reports, 78.

the narrative of love and favour, binding himself to pay to her in liferent, and to her children *nati et nascituri* in fee, at the first term after his decease, the sum of L. 1200 Sterling. The doubt was, whether both sums were due to Emilia, or only the latter. It was admitted, that both sums would be due at common law, which looks no farther than the words. But that this was not the intention of the granter, was urged from the following circumstance, That in the bond for the L. 1200 there is no mention of the former legacy, nor of any legacy; which clearly shews, that Anthony had forgot the first legacy, and consequently that he intended no more for Emilia but L. 1200 in whole. Which was accordingly decreed\*.

ART. II. *Where the words are short of will.*

BETWEEN this article and a following section, intituled *Imply'd will*, there is much affinity; but as the blending together

\* 22d December 1752, Emilia Belsches and her husband contra Sir Patrick Murray.



things really distinct, tends to confusion of ideas, I have brought under the present article, acts of will that are indeed expressed, but so imperfectly as to leave room for doubt whether the will does not go farther than is spoken out; leaving to the section *ImPLY'd will* articles essential to the deed or covenant, that must have made a part of the maker's will, and yet are totally omitted to be expressed.

In England, where estates are settled by will, it is the practice to make up any defect in the words, in order to support the will of the deviser. But here it is essential, that the will be clearly ascertained, in order that the court may run no hazard of overturning the will, instead of supporting it. An executor being named with the usual power of managing the whole money and effects of the deceased, the following clause subjoined "And I hereby debar and seclude all others from any right or interest in my said executry," was held by the court to import an universal legacy in favour of the executor \*. A man having two nephews who were his

\* 1st February 1739, John Beizly contra Gabriel Napier.

heirs at law, made a settlement in their favour, dividing his farms between them, intending probably an equal division. A farm was left out by the omission of the clerk, which the scrivener swore was intended for the plaintiff. The court refused to amend the mistake, leaving the farm to descend as *ab intestato* \*. For here it was not clear that the maker of the deed intended an equal division.

There being an entail of the estate of Cromarty to heirs-male, the Earl, in his contract of marriage, *anno* 1724, became bound, in case of children of the marriage who should succeed to and enjoy the estate, to invest his lady in a life-rent-locality of forty chalders victual; and in case of no children to succeed to and enjoy the estate, he became bound to make the said locality fifty chalders. The following clause is added: "That if at the  
 " dissolution of the marriage there should  
 " be children succeeding to and enjoying  
 " the estate, but who should afterward de-  
 " cease during the life of his said spouse,  
 " she from that period should be entitled  
 " to fifty chalders, as if the said children

\* 1. Vernon 37.

" had

“ had not existed.” The Earl being forfeited in the year 1745, having issue both male and female, a claim was entered by his lady for the jointure of fifty chalders, to take effect after her husband’s death. Objected by his Majesty’s Advocate, That she is intitled to forty chalders only, there being sons of the marriage, who but for the forfeiture would have succeeded to the estate. Here evidently the words fall short of intention; for as the claimant would have had a jointure of fifty chalders if the Earl’s brother or nephew had succeeded to the estate, there can be no doubt that had the event of forfeiture been foreseen, the Earl would have given her at least fifty chalders. The claim accordingly was sustained\*.”

Walter Riddel, in his contract of marriage 1694, became bound to settle his whole land-estate on the heir-male of the marriage. In the year 1727, purposing to fulfil that obligation, he disposed to his eldest son the lands therein specified, burdened with his debts, reserving to himself an annuity of 2000 merks only.

\* 26th January 1764, Countess of Cromarty contra the Crown.

The lands of Stewarton, which came under the said obligation, were left out of the disposition 1727. But that they were omitted by oversight, without intention, was made evident from the following circumstances: first, That the title-deeds of that farm were delivered to the son along with the other title-deeds; second, That he took possession of the whole; third, That a subsequent deed by the father *anno* 1733, proceeds upon this narrative, "That the whole lands belonging to him were conveyed to his son by the disposition 1727." Many years after, the father, having discovered that Stewarton was not mentioned in the said disposition, ventured to convey that farm to his second son, who was otherwise competently provided. It was not pretended, that Stewarton was actually conveyed to the eldest son, which could not be but in a formal disposition; but as there was clear evidence of the father's obligation to convey it with the rest of the estate, which obligation he was still bound to fulfil, the court judged this a sufficient foundation for voiding



the gratuitous disposition to the second son \*.

In the cases mentioned, writing is necessary as evidence only : it is of no consequence what words be used in the nomination of an heir or of an executor, provided the will of the maker be ascertained. But in several transactions, writing, beside the evidence it affords, is an indispensable solemnity. Land cannot be convey'd without a procuratory or a precept, which must be in a set form of words. A man may lend his money upon a verbal paction, but he cannot proceed directly to execution, unless he have a formal bond containing a clause of registration, authorising execution. Neither can such a bond be convey'd to a purchaser, otherwise than by a formal assignment in writing. Here a new speculation arises, What power a court of equity hath over a writing of this kind. In this writing, no less than in others, the words may happen erroneously to be more extensive than the will of the granter ; or they may happen to be more limited. Must the words in all cases

\* January 4. 1766, Riddel contra Riddel of Glenriddel.

be the sovereign rule ? Far from it. Though in certain transactions writ is an essential solemnity, it follows not that the words solely must be regarded, without relation to will ; for to bind a man by words where he hath not interposed his will, is contrary to the most obvious principles of justice. Hence it necessarily follows, that a deed of this kind may, by a court of equity, be limited to a narrower effect than the words naturally import ; and that this ought to be done, where from the context, from the intendment of the granter, or from other convincing circumstances, it can be certainly gathered, that the words by mistake go beyond the will. But though in ordinary cases, such as those above mentioned, the defect of words may be supplied, and force given to will, supposing it clearly ascertained ; yet this cannot be done in a deed to which writ is essential. The reason is, that to make writ an essential solemnity, is in other words to declare, that action must not be sustained except as far as authorised by writ. However clear therefore will may be, a court of equity hath not authority to sustain action upon it, independent of

the words where these are made essential ; for this, in effect, would be to overturn law, which is beyond the power of equity. A case that really happened, is a notable illustration of this doctrine. A bond of corroboration granted by the debtor with a cautioner, was of the following tenor. “ And seeing the foresaid  
 “ principal sum of 1000 merks, and interest since Martinmas 1742, are resting  
 “ unpaid ; and that *A* the creditor is  
 “ willing to supersede payment till the  
 “ term after mentioned, upon *B* the debtor’s granting the present corroborative  
 “ security with *C* his cautioner ; therefore  
 “ *B* and *C* bind and oblige them, conjunctly and severally, &c. to content  
 “ and pay to *A* in liferent, and to her  
 “ children in fee, equally among them,  
 “ and failing any of them by decease, to  
 “ the survivors, their heirs or assignees,  
 “ in fee, and that at Whitsunday 1744,  
 “ with 200 merks of penalty, together  
 “ with the due and ordinary annual rent  
 “ of the said principal sum from the said  
 “ term of Martinmas 1742,” &c. Here the obligatory clause is imperfect, as it omits the principal sum corroborated, namely,

ly, the 1000 merks, a pure oversight of the writer. In a suit upon this bond of corroboration against the heir of the cautioner, it was objected, That upon this bond no action could lie against him for payment of the principal sum. It was obvious to the court, that the bond, though defective in the most essential part, afforded clear evidence of C's consent to be bound as cautioner. But then it occurred, that a cautionary engagement is one of those deeds that require writing in point of solemnity. A defective bond, like the present, whatever evidence it may afford, is still less formal than if it wanted the requisites of the act 1681. Action accordingly was denied; for action cannot be sustained upon consent alone where a formal deed is essential\*. The following case concerning a registrable bond, or, as termed in England, *a bond in judgement*, is another instance of refusing to supply a defect in words. A bond for a sum of money bore the following clause, *with interest and penalty*, without specifying any sum in name of penalty. The creditor moved

\* 2d June 1749, Colt contra Angus.



the court to supply the omission, by naming the fifth part of the principal sum, being the constant rule as to consensual penalties. There could be no doubt of the granter's intention; and yet the court justly thought that they had not power to supply the defect\*.

But though a defect in a writ that is essential in point of solemnity, cannot be supplied so as to give it the full effect that law gives to such a deed, it will however be regarded by a court of equity in point of evidence. A bond of borrowed money, for example, null by the act 1681 because the writer's name was neglected, may, in conjunction with other evidence, be produced in an action for payment; in order to prove delivery of the money as a loan, and consequently to found a decree for repayment.

ART. III. *Where the words go beyond will.*

It is a rule in daily practice, That

\* Fountainhall, 6th January 1705, Leslie contra Ogilvie.

however

however express the words may be, a court of equity gives no force to a deed beyond the will of the granter. This rule is finely illustrated in the following case. John Campbell, provost of Edinburgh, did in July 1734 make a settlement of the whole effects that should belong to him at the time of his death, to William his eldest son, with the burden of provisions to his other children, Matthew, Daniel, and Margaret. Daniel being at sea in a voyage from the East Indies, made his will, May 1739, in which he "gives and bequeaths" all his goods, money, and effects, to "John Campbell his father; and in case of John's decease, to his beloved sister Margaret." The testator died at sea in the same month of May; and in June following John the father also died, without hearing of Daniel's death, or of the will made by him. William brought an action against his sister Margaret and her husband, concluding, That Daniel's effects, being vested in the father, were conveyed to him the pursuer by the father's settlement; and that the substitution in favour of Margaret, contained in Daniel's will, was thereby altered. It was answered,  
That

That nothing could be intended by the Provost, but to settle his proper estate upon his eldest son, without any intention to alter the substitution in his son Daniel's testament, of which he was ignorant : That words are not alone, without intention, sufficient to found a claim ; and therefore, that the present action ought not to be sustained. " The court judged, " That the general disposition 1734, granted by John Campbell to his son, the pursuer, several years before Daniel's will had a being, does not evacuate the substitution in the said will \*." Charles Farquharson writer, being in a sickly condition and apprehensive of death, did, *anno* 1721, settle all the effects real and personal that should belong to him at his death, upon his eldest brother Patrick Farquharson of Inverey, and his heirs ; reserving a power to alter, and dispensing with the delivery. Charles was at that time a bachelor, and died so. Being restored to health, he not only survived his brother Patrick, but also Patrick's two sons, who successively inherited the estate

\* 13th June 1740, Campbell contra his Sister.

of Inverey. Patrick left daughters; but as the investitures were to heirs-male, Charles was infeft as heir-male, died in possession, and left the estate open to the next heir-male. Against him a process is raised by the daughters of Patrick, claiming the estate of Inverey upon the settlement 1721 as belonging to Charles at the time of his death, and consequently now to them as heirs of line to Patrick. The defence was, That here the words of the settlement are more extensive than the will of the granter, which was only to augment the family-estate by settling his own funds on Patrick the heir of the family; that this purpose was fulfilled by the coalition of both estates in the defendant, the present head of the family; whereas the claim made by the pursuers, the purpose of which is to take from the representative of the family the family-estate itself, is not only destitute of any foundation in the maker's will, but is in direct opposition to it. The court judged, That the pursuers had no action on the deed 1721 to oblige the defendant to denude of the e-



state of Inverey \*. A contract of marriage providing the estate to the heirs-male of the marriage, whom failing, to the husband's other heirs-male, contained the following clause, "And seeing the earldom of Perth is tailzied to heirs-male, so that if there be daughters of the marriage they will be excluded from the succession; therefore the said James Lord Drummond and his heirs become bound to pay to the said daughters, at their age of eighteen or marriage, the sums following; to an only daughter 40,000 merks," &c. The estate being forfeited for treason committed by the eldest son of the marriage, the only daughter of the marriage claimed the 40,000 merks as being excluded from the succession by the existence of an heir-male. Objected by the King's Advocate, That the provision not being to younger children in general, but to daughters only, upon consideration that the estate was entailed to heirs-male, was obviously intended to be conditional, and only to take effect failing sons of the mar-

\* 10th February 1756, Heirs of line of Patrick Farquharson contra his Heir-male.

riage; and that here inadvertently the words are more extensive than the will. It carried however, by a narrow plurality, to sustain the claim \*. But the judgement was reversed in the House of Lords.

The same rule obtains with respect to general clauses in discharges, submissions, assignments, and such like, which are limited by equity where the words are more extensive than the will. Thus, a general submission of all matters debateable, is not understood to comprehend land or other heritable right †. Nor was a general clause in a submission extended to matters of greater importance than those expressed ‡. *A* had a judgement of L. 6000 against *B*. *B* gave *A* a legacy of L. 5, and died. *A*, on receipt of this L. 5, gave the executor of *B* a release in the following words. “ I acknowledge to have received  
“ of *C* L. 5, left me as a legacy by *B*, and  
“ do release to him all demands which I

\* 10th July 1752, Lady Mary Drummond contra the King's Advocate.

† Hope, (Arbiter), 4th March 1612, Paterfon contra Forret.

‡ Haddington, 4th March 1607, Inchaffray contra Oliphant.

“ against him, as executor to *B*, can have “ for any matter whatever.” It was adjudged, That the generality of the words *all demands* should be restrained by the particular occasion mentioned in the former part, namely, the receipt of the *L. 5*, and should not be a discharge of the judgment \*.

A variety of irritancies contrived to secure an entail against acts and deeds of the proprietor, furnish proper examples of this doctrine. Where such irritancies are so expressed as to declare the proprietor's right voidable only, not *ipso facto* void, an act of contravention may be purged before challenge, and even at any time before sentence in a process of declarator. But what shall be said upon clauses declaring the proprietor to fall from his right *ipso facto* upon the first act of contravention? Supposing the entailer by this clause to have only intended to keep his heirs of entail to their duty, which *in dubio* will always be presumed, his purpose is fulfilled if the estate be relieved from the debts and deeds of the tenant in tail.

\* Abridgement Cases in equity, chap. 25. sect. C. note at the end.

The words indeed are clear; but words unsupported by will have no effect in law. The act 1685 concerning tailzies declares, "That if the provisions and irritant clauses are not repeated in the rights and conveyances by which the heirs of tailzie bruik or enjoy the estate, the omission shall import a contravention of the irritant and resolute clauses against the person and his heirs who shall omit to insert the same, whereby the estate shall *ipso facto* fall, accresce, and be devolved upon the next heir of tailzie; but shall not militate against creditors," &c. Here the words go inadvertently beyond will. It cannot be the will of any entailor, to forfeit his heir for an omission that the heir supplies *rebus integris*. Nor could it be the intendment of the legislature to be more severe than entailors themselves commonly are. This irritancy, according to order, ought to come in afterward in treating of equity with respect to statutes; but by the intimacy of its connection with the irritancies mentioned, it appears in a better light here.

The foregoing irritancies relate to grants and single deeds. The following is an example



ample of a conventional irritancy, an irritancy *ob non solutum canonem* in a lease or feu-right. Such a clause expressed so as to make the right voidable only upon failure of payment, is just and equal; because, by a declarator of irritancy, it secures to the superior or landlord payment of what is due to him, and at the same time affords to the vassal or tenant an opportunity to purge the irritancy by payment. And even supposing the clause so expressed as to make failure of payment an *ipso facto* forfeiture, it will be held by a court of equity, that the words go inadvertently beyond the will; and a declarator of irritancy will still be necessary, in order to afford an opportunity for purging the irritancy.

Conditional bonds and grants afford proper examples of the same kind. These are of two sorts. One is where the condition is ultimate; as for example, a bond for money granted to a young woman upon condition of her being married to a man named, or a bond for money to a young man upon condition of his entering into holy orders. The other is where the condition is a means to a certain end;

as for example, a bond for a sum of money to a young woman upon condition of her marrying with consent of certain friends named, the intendment of which is to prevent an unfuitable match. Conditions of the first sort are taken strictly, and the sum is not due unless the condition be purified. This is requisite at common law; and no less so in equity, because justice requires that a man's will be obey'd. To judge aright of the other sort, we ought to lay the chief weight upon the ultimate purpose of the granter; which, in the case last mentioned, is to confine the young woman to a suitable match. If she therefore marry suitably, though without consulting the friends named, I pronounce that the bond ought to be effectual in equity, though not at common law. The reason is given above, that the ultimate will or purpose ought to prevail in opposition to the words. I am aware, that in Scotland we are taught a different lesson. In bonds of the sort under consideration, a distinction is made between a suspensive condition, and one that is resolute. If the bond to the young woman contain a resolute condition only, namely, *if she marry*

*marry without consent she shall forfeit the bond*, it is admitted, that the forfeiture will not take effect unless she marry unfuitably. But it is held by every one, that if the condition be suspensive, as where a bond for money is granted to a young woman, *on condition that if she marry it be with consent of certain friends named*, it must be performed in the precise terms of the clause; because, say they, the will of the granter must be the rule; and no court has power to vary a conditional grant, or to transform it into one that is pure and simple. This argument is conclusive where a condition is ultimate, whether suspensive or resolute; but not where the condition is a means to an end. The granter's will, it is true, ought to be obey'd; but whether his will with regard to the means, or his will with regard to the end? The means are of no significance but as productive of the end; and if the end be accomplished without them, they can have no weight in equity or in common sense. Let us try the force of this reasoning by bringing it down to common apprehension. Why is a resolute condition disregarded, where the ob-

ligee

ligees marries suitably? For what reason but that it is considered as a mean to an end; and that if the end be accomplished, the granter's purpose is fulfilled? Is not this reasoning applicable equally to a suspensive condition? No man of plain understanding, unacquainted with law, will discover any difference. And accordingly, in the later practice of the English court of chancery, this difference seems to be disregarded. A portion of L. 8000 is given to a woman provided she marry with consent of A; and if she marry without his consent, she shall have but L. 100 yearly. She was relieved, though she married without consent; for the proviso is *in terrore* only\*.

One having three daughters, devises lands to his eldest, upon condition that within six months after his death she pay certain sums to her two sisters; and if she fail, he devises the land to his second daughter on the like condition. The court may enlarge the time for payment, though the premises are devised over. And in all cases where compensation can be made for

\* Abridg. Cases in equity, chap 17. sect. C. § 1.



the delay, the court may dispense with the time, though even in the case of a condition precedent \*. This practical rule is evidently derived from the reasoning above stated.

Take another example that comes under the same rule of equity. A claim is transacted, and a less sum accepted, upon condition that the same be paid at a day certain, otherwise the transaction to be void. It is the general opinion, that where the clause is resolute, equity will relieve against it after the stipulated term is elapsed, provided the transacted sum be paid before process be raised; but that this will not hold where the clause is suspensive. In my apprehension, there is an equitable ground for relief in both equally. The form may be different, but the intention is the same in both, namely, to compel payment of the transacted sum; and therefore if payment be offered at any time before a declarator of irritancy, with damages for the delay, the conditional irritancy has had the full effect that was intended. Equity therefore requires a decla-

\* Abridg. Cases in equity, chap. 17. sect. B. § 5.

rator of irritancy, whether the clause be suspensive or resolute; and the defendant ought to be admitted to purge the failure by offering payment of the transacted sum. The case, I acknowledge, is different where the transacted sum is to be paid in parcels, and at different periods; as for example, where an annuity is transacted for a less yearly sum. A court of equity will scarce interpose in this case, but leave the irritancy to take place *ipso facto*, by the rules of common law; for if the irritant clause be not in this case permitted to operate *ipso facto*, it will be altogether ineffectual, and be no compulsion to make payment. If a declarator be necessary, the defendant must be admitted to purge before sentence; and if it be at all necessary, it must be renewed every term where there is a failure of payment. This would be unjust, because it reduces the creditor to the same difficulty of recovering the transacted sum, that he had with respect to his original sum; which, in effect, is to forfeit the creditor for his moderation, instead of forfeiting the debtor for his ingratitude.

The examples above given coincide in the following particular, that the acts of

contravention can be purged, so as to restore matters to the same state as if there had been no contravention. But there are acts incapable of being purged, such as the cutting down trees by a tenant. Now, suppose a lease be granted with a clause of forfeiture in case of felling trees, will equity relieve against this forfeiture in any case? If the act of contravention was done knowingly, and consequently criminally, there can be no equity in giving relief; but if it was done ignorantly and innocently, a court of equity ought to interpose against the forfeiture, upon making up full damages to the landlord. Take the following instance. The plaintiff, tenant for life of a copyhold-estate, felled trees, which, at a court-baron, was found a waste, and consequently a forfeiture. The bill was to be relieved against the forfeiture, offering satisfaction if it appeared to be a waste. The court decreed an issue, to try whether the primary intention in felling the trees was to do waste; declaring, That in case of a wilful forfeiture it would not relieve\*.

\* 1. Chancery cases 95.



A power granted to distribute a sum or a subject among children, or others, is limited in equity to be exercised *secundum arbitrium boni viri*, unless an absolute power be clearly expressed. A man devised to his wife his personal estate, upon trust and confidence, "That she should not dispose thereof but for the benefit of her children." She by will gave to one but five shillings, and all the rest to another. The court set aside so unequal a distribution\*. A man by will directed that his land should descend to his daughters, "in such shares as his wife by a deed in writing should appoint." The wife makes an unequal distribution. The court at first declared, the circumstances must be very strong, as bribery, for instance, or corruption, that could take from the wife a power given her by the will: but afterward declared the case was proper for equity, and that the plaintiff might be relieved. Here the plaintiff was allowed but a small proportion; and for any causeless displeasure she might have been put off with a single barren acre; that the court in the latter case would have a jurisdiction; and

\* 1. Vernon 66.

therefore



therefore in the case that really happened \*.

## S E C T. II.

### *Implied Will.*

**I**N framing a deed it belongs to the grantor to declare his will and purpose: the proper clauses for expressing these are left to the writer. But seldom it happens that every particular is expressed: nor is it necessary; for where a man declares his will with respect to a certain event, he undoubtedly wills every necessary mean; which is only saying, that he is not a changeling. I grant, for example, to a neighbour, liberty of my coal-pit for the use of his family. It follows necessarily, that he have a coal-road through my land, if he have not otherwise access to the pit. The same holds in covenants. A clause in a lease entitling the lessee to take possession at a time specified, implies ne-

\* 1. Vernon 355. 414.

cessarily

cessarily authority from the landlord to remove the tenant in possession.

Tacit will, where made clear from circumstances, ought to have the same authority with expressed will : the only use of words is to signify will or intention ; and from the very nature of the thing, will or intention cannot have greater authority when expressed in words, than when ascertained with equal clearness by any other signs or means. A court of common law rarely ventures to dive into tacit will. But it is one of the valuable powers of a court of equity, to imply will where it is not expressed ; without which deeds and covenants would often fall short of their purposed end. But a judge ought to be extremely cautious in the exercise of this power, to avoid counteracting will, instead of supporting it ; an error that seems to have been committed in the following case. The sum of L. 120 was given with an apprentice ; and as the master was sick when the articles were drawn, it was provided, that if he died within a year L. 60 should be returned. He having died within three weeks, a bill was brought in chancery to have a greater sum returned. And not-

notwithstanding the exprefs provision, it was decreed that a hundred guineas should be returned \*.

As tacit will is to be gathered from various circumstances, particularly from the nature and intendment of the deed or covenant, general rules are not to be expected. All I can venture on, is to give examples of various kinds, which may enure the student of law to judge, in what cases will ought to be imply'd, in what not. For the sake of perspicuity, these examples shall be put in different classes. And first, of *accessories*. Where a subject is conveyed, every one of its accessories are understood to be conveyed with it, unless the contrary be expressed. An assignment, for example, of a bond of borrowed money, implies a conveyance of what executions have passed upon it: these may be of use to the assignee; but can avail nothing to the cedent after he is denuded. Thus, an assignment to a bond was understood to comprehend an inhibition that followed upon it; though there was no general clause that could compre-

\* Vernon 460.



hend the inhibition \*. In an infeftment of annualrent a personal obligation for payment is now common. In the conveyance of an infeftment containing that obligation, no mention was made of it. It was however imply'd by the court of session; as there appeared no intention to relieve the debtor †. Tenants, taken bound by lease to carry their corn-rent to the place of sale, were decerned to perform that service to the proprietor's widow, infeft in a liferent-locality ‡. Such implication is not made with respect to penal accessories: these will not go to the assignee, unless expressly convey'd. The superior of a feu-right disposes the same for a valuable consideration; but antecedently the feu had incurred an irritancy upon failing to pay his feu-duty. Is the purchaser entitled to reduce the feu upon that head? The irritancy is indeed an accessory to the superiority; but loosely con-

\* Harcarfe, (Assignment), January 1682, Williamson contra Threapland.

† Dury, 23d November 1627, Dunbar contra Williamson.

‡ Fountainhall, 29th July 1680, Countess-dowager of Errol contra the Earl.



nected and easily separated. The punishment is what few superiors are so hard-hearted as to inflict; and a superior who declines the taking advantage of it for himself, will not readily bestow the power on another. If intended therefore to be convey'd, it must be expressed; for it will not be imply'd by a court of equity.

A discharge of the principal debt includes accessories by imply'd will. An agent, for example, employ'd to carry on a process, states an account without any article for pains. He receives payment of the sum in the account, and gives a discharge. The article for pains is understood to be also discharged. Implied will is extended still farther. The extract of a decree implies the passing from any claim for costs of suit; because no rational person who purposes to claim such costs will reserve them for a new process, when by delaying extract it is so much more easy to claim them in the same process.

So much for accessories. Next, of *consequents*. A commission being given to execute any work, every power necessary to carry it on is implied. Example: A man commissioned to navigate a ship,  
 termed

termed the *master*, can bind his owners to pay what money he has borrowed in a foreign country for repairing the ship.

I shall add but one class more, which is, where in a settlement upon one person a benefit is understood to be conferred on another. Thus, where a man devises land to his heir after the death of his wife, this by necessary implication is a good device to the wife for life : by the words of the will, the heir is not to have it during her life; and none else can have it, as the executors cannot intermeddle \*. But if a man devises land to a stranger after the death of his wife, this does not necessarily infer, that the wife should have the estate for her life : it is but declaring at what time the stranger's estate shall commence; and in the mean time the heir shall have the land † (a).

I close this head with the following reflection, That the power of implying will

\* New abridgement of the law, vol. 2. p. 66.

† Ibid.

(a) This is a proper example of a maxim in the Roman law, *Positus in conditione non censetur positus in institutione*.

can only be of use where tacit will is authoritative: it can avail nothing where writing, and consequently words, are essential. To make a valid entail, for example, words are essential: tacit will avails nothing.

### S E C T. III.

*Whether an omission in a deed or covenant can be supplied.*

With regard to the former section, a court has no occasion to extend its equitable power farther than to dive into tacit will and to bring it into day-light. With respect to the present section, the court is called on to extend its power a great way farther, in order to do justice. In framing a deed or covenant, every necessary circumstance is not always in view: articles are sometimes omitted essential to the deed or covenant; which therefore ought to be supplied, in order to do justice to the parties concerned. It is a bold step in a court to supply will in any particular,

lar, which so far is making a will for a man who omitted to make one for himself; but where will is declared with respect to capital articles, so as to create a right to one or to both of the parties, it is the duty of a court of equity to supply omissions, in order to make the rights created effectual: a right is created by what is actually agreed on; the court is bound to give force to that right, according to the maxim, That right ought never to be left without remedy.

This extraordinary power ought never to be exercised but where it clearly follows from the nature of the writing, from the intendment of parties, or from other pregnant circumstances, that there really is an omission of some clause that would have been expressed had it occurred to the parties. If a court should venture to interpose without being certain that the clause was not purposely left out, they would be in hazard of making a will for a man, and overturning that which he himself made. But where they are satisfied that there is really an omission, their supplying the omission is not making a will for a man, but,



but, on the contrary, is completing his will.

This doctrine will be illustrated by the following examples. In a wadset the naming a consignator is omitted; which could not be done purposely, a consignator being an essential person in following out an order of redemption. From the nature of the contract, the granter is intitled to redeem; and to make his right effectual, the court will name a consignator. Upon a wadset granted to be held of the superior, an infeftment passed; but it was omitted to provide, that the wadsetter, on redemption, should surrender the subject to the superior for new infeftment to the reverser. The court of session, considering that this is a proper clause, and that the wadsetter could not have objected to it had it occurred in framing the wadset, decreed him to grant a procuratory of resignation\*.

A man lent a sum on bond, payable to to himself and to his children *nominatim* in fee, with the following provision,

\* Dury, 9th February 1628, Simson contra Boswell; Gosford, 25th June 1625, Duke Lauderdale contra Lord and Lady Yester.

“ That

“ That in case of the decease of any of  
 “ the said children, the share of that child  
 “ shall be equally divided among the sur-  
 “ vivors.” One of the children, a son,  
 having predeceased his father, leaving is-  
 sue, it was questioned, whether his share  
 of the bond descended to his issue, or ac-  
 cresced to the survivors. Here was evi-  
 dently an omission ; as the granter could  
 not intend to exheredate the issue of any  
 of his children. And accordingly the issue  
 of the son were preferred \*. Papinian,  
 the greatest of the Roman lawyers, deli-  
 vers the same opinion in a similar case :  
 “ Cum avus filium ac nepotem ex altero  
 “ filio heredes instituisset, a nepote petiit,  
 “ ut si intra annum trigesimum moriretur,  
 “ hereditatem patruo suo restitueret : nepos,  
 “ liberis relictis, intra ætatem superscrip-  
 “ tam vita decessit : fideicommissi condi-  
 “ tionem, conjectura pietatis, respondi de-  
 “ fecisse, quod minus scriptum quam di-  
 “ ctum fuerat inveniretur †.” Our au-  
 thor supposes, that the testator had provi-  
 ded for the issue of his grandchildren, but

\* 21st November 1738, Magistrates of Montrose con-  
 tra Robertson.

† l. 102. De cond. demonstr. et causis.

that

that the provision had been casually omitted by the writer. This is cutting the Gordian knot, instead of untying it; for what if the writer had not received any such instruction? There is no occasion for Papinian's conjecture: it was obviously an omission, which a court of equity ought to supply, in order to do justice, and to fulfil the intendment of the creditor.

A man believing his wife to be pregnant, left a legacy to a friend in the following terms, "That if a male child was brought forth, the sum should be 4000 merks; if a female, 5000 merks." The wife produced no child. As a legacy was intended even in case of a child, it cannot be thought that the friend should have no legacy if no children were born. The clause therefore is evidently imperfect, a member being wanting, that of the testator's dying without children. The want of that member was a pure omission, which the testator would have supplied had the event occurred to him; and which a court of equity may supply, in order fully to accomplish the intendment of those who are



no longer in being to speak for themselves. The court of session accordingly found the highest sum due *ex præsumpta voluntate testatoris* \*. They could go no further without exerting an act of power altogether arbitrary; as they had no *data* for determining what greater length the testator himself would have gone. Here it is proper to be observed, that in the former cases mentioned, a right was created, to make which effectual a court of equity ought to lend their aid. In the present case, there was no right created; and a court of equity had no call to interpose, but in order to give the most liberal effect to deeds made by persons deceased. The present case then is much more delicate than any formerly mentioned.

But now, what if the wife had brought forth twins? Though the testator gave a legacy in the event of a single child, it follows not necessarily, that he would have given a legacy had he foreseen the birth of two children. Therefore, as it is not certain that in the case here figured there is

\* Dirleton, 18th July 1666, Wedderburn contra Scrimzeor.



any omission, a court cannot interpose, without hazarding the making a will for a man that he himself would not have made. I venture this opinion even against the authority of Julianus, the most acute of all the writers on the Roman law. ‘ Si  
 ‘ ita scriptum fit, “ Si filius mihi natus  
 “ fuerit, ex hęsse heres esto, ex reliqua  
 “ parte uxor mea heres esto; si vero filia  
 “ mihi nata fuerit, ex triente heres esto,  
 “ ex reliqua parte uxor heres esto:” et fi-  
 ‘ lius et filia nati essent: dicendum est, as-  
 ‘ sem distribuendum esse in septem partes,  
 ‘ ut ex his filius quatuor, uxor duas, filia  
 ‘ unam partem habeat: ita enim secun-  
 ‘ dum voluntatem testantis, filius altero  
 ‘ tanto amplius habebit quam uxor, item  
 ‘ uxor altero tanto amplius quam filia.  
 ‘ Licet enim subtili juris regulę convenie-  
 ‘ bat, ruptum fieri testamentum, attamen,  
 ‘ quum ex utroque nato testator voluerit  
 ‘ uxorem aliquid habere, ideo ad hujus-  
 ‘ modi sententiam humanitate suggerente  
 ‘ decursus est; quod etiam Juventio Celso  
 ‘ apertissime placuit \*.

\* l. 13. pr. De liberis et posthumis heredibus insti-  
 tuendis.

In a contract of marriage there was the following clause: "And in case there shall  
 " happen to be only one daughter, he ob-  
 " liges him to pay the sum of 18,000  
 " merks; if there be two daughters, the  
 " sum of 20,000 merks, 11,000 to the eld-  
 " est, and 9000 to the other; and if there  
 " be three daughters, the sum of 30,000  
 " merks, 12,000 to the eldest, 10,000 to  
 " the second, and 8000 to the youngest."

There the contract stops, because probably a greater number was not expected. The existence of a fourth daughter brought on the question, Whether she could have any share of the 30,000 merks, or be left to insist for her legal provision *ab intestato*. As it appeared to be the father's intention to provide for all the children of the marriage, and as he certainly would have provided for the fourth daughter, it belonged to a court of equity to supply the omission, by naming to her such a sum as he himself would have done. The court decreed 4500 merks to the fourth daughter, as her proportion of the 30,000 merks; and restricted the eldest daughter to 10,500, the second to 8500, and the

third to 6500 \*. The following case stands on the same foundation. ‘Clemens Patronus testamento caverat, “Ut si sibi filius natus fuisset, heres esset: si duo filii, ex æquis partibus heredes essent: si duæ filiæ, similiter: si filius et filia, filio duas partes, filiæ tertiam dederat.” Duobus filiis et filia natis, quærebatur quemadmodum in proposita specie partes faciemus: cum filii debeant pares, vel etiam singuli duplo plus quam soror accipere. Quinque igitur partes fieri oportet, ut ex his binas masculi, unam foemina accipiat †.’

No article concerning law ought to be more relished, than the authority a court of equity is endued with to make effectual deeds and covenants, not only according to the actual will of the parties, but according to their honest wishes. With respect to family-settlements in particular, a man in his last moments has entire satisfaction in reflecting, that his settlement will be made effectual after his death, candidly and fairly, as if he himself were at hand to explain his views. So great stress is laid up-

\* 18th July 1729. Anderson contra Anderson.

† l. 81. pr. De heredibus instituendis.



on will as the fundamental part of every engagement, that where it is clear, defects in form are little regarded by a court of equity. Take the following instances. A man settles his estate on his eldest son in tail, with a power, by deed or will under seal, to charge the land with any sum not exceeding L. 500. A deed is prepared and ingrossed, by which he appoints the L. 500 to his younger children; but dies without its being signed and sealed. Yet this in equity shall amount to a good execution of his power, the substance being performed\*. Here there could be no doubt about the man's will creating a right to his younger children. The power he reserved of charging the estate by deed or will under seal, was not intended to make their right conditional, but to give them the highest security that is known in law. This security was indeed disappointed by the man's sudden death; but he had sufficiently declared his purpose to give them L. 500, which afforded them a good claim in equity for that sum. Provost Aberdeen wishing to have a country-seat

\* Abridg. Cases in equity, ch. 44. sect. B. § 14.



near the town of Aberdeen, purchased the lands of Crabstone from Farquharson of Invercauld for L. 3900 Sterling; and missive letters were exchanged, agreeing that the lands should be disposed to the Provost in liferent, and in fee to any of his children he should name. The title-deeds were delivered to a writer, who, by the Provost's order, made out a scroll of the disposition, to the Provost in liferent, and to Alexander the only son of his second marriage in fee. A disposition was extended 12th June 1756, and dispatched to Invercauld, inclosed in the following letter, subscribed by the Provost: "This will come along with the amended disposition; and upon its being delivered to me duly signed, I am to put the bond for the price in the hands of your doer." Invercauld not being at home, the packet was delivered to his lady. As soon as he came home, which was on the 21st of the said month, he subscribed the disposition, and sent it with a trusty hand to be delivered to the Provost at Aberdeen. But he, having been taken suddenly ill, died on the 24th of June, a few hours before the express arrived; whereby it happened, that the

the disposition was not delivered to him, nor the bond for the price subscribed by him. This unforeseen accident gave rise to a question between Robert, the Provost's eldest son and heir, and the said Alexander, son of the second marriage. For Robert it was pleaded, That the disposition remained an undelivered evident under the power of the granter; nor could it bind the Provost, since it was not accepted by him; and laying aside that incompleated deed, nothing remained binding but the mutual missives; the benefit of which must descend to the Provost's heir at law, seeing none of his children is named in these missives. It was answered for Alexander, That his father's will being clearly for him, it is the duty of the court of session to make it effectual. And he accordingly was preferred \*. A settlement being made on a young woman, proviso that she marry with consent of certain persons named, the consent to be declared in writing; a consent by parole was deemed sufficient †. For it was not understood to be the will of

\* 13th December 1757. Alexander Aberdeen contra Robert Aberdeen.

† 1. Modern Reports, 310.

the maker to forfeit the young woman merely for the want of form, when the substance was preserved. Land cannot be charged but by a formal deed; for such is the common law. But a court of equity may supply a defective deed, considered as a satisfactory evidence of will, by subjecting the heir personally. In one case, the court of session made a wide step. In a disposition the granter reserved power to burden the land with a sum to particular persons named. The disponent was made liable for the sum, though the disponent had made no step toward exercising the power\*. This indeed was a favourable case, the power reserved being to provide younger children. And yet, were this extension of equity to be justified, I cannot discover any bounds to equitable powers. What better evidence can be required of the disponent's resolution not to exert his reserved power, than his forbearing to exert it?

I must observe upon this section in general, that to ascertain what was a man's will, to make it effectual, and to supply omissions, afford a spacious field in equity

\* Gosford, 15th February 1673, Graham contra Morphey.



for supporting deeds and covenants, upon which the prosperity of society and many of its comforts greatly depend. But as far as I discover, equity, which has a free course in supporting will, never is exerted against it. It ventures not to alter a man's will, far less to void it: it cannot even supply will where totally wanting. Where a deed or covenant is fairly made without any reserved power to alter, what before was voluntary, becomes now obligatory; and it must have its course, whatever be the consequence. However clear it may be, that it would not have been made had the event been foreseen, yet no court of law is impowered to void the writing or to alter it; for this would be to make a settlement for a man who himself made none. Power so extensive would be dangerous in the hands of even the most upright judges. I dare not except a British parliament.

Were a court of law endued with a power to alter will, or to supply its total absence, the following cases would be a strong temptation to exercise the power. A gratuitous bond by a minor being voided at the instance of his heir, because a



minor cannot bind himself without a valuable consideration; the obligee insisted for an equivalent out of the moveables left by the minor, on the following ground, That he could have left the same sum to his friend by way of legacy. It was admitted, that if the heir's challenge had been foreseen, the minor probably would have given a legacy instead of a bond: but that in fact the minor gave no legacy; and no court can make a testament for a man, who himself made none: which accordingly was found \*. The bond here was complete in all its parts, and no article omitted that a court of equity could supply. There was indeed a defect of foresight with respect to what might happen; but a court of equity does not assume a power to supply defects of that kind. The like was found with respect to a gratuitous disposition of an heritable subject, which was voided as being granted on deathbed. The disponent claimed the value from the executor, presuming that the deceased, had the event been foreseen, would have given an equivalent out of his moveables. But as in fact the deceased signified no will nor

\* Fountainhall, 15th December 1698, Straiton contra Wight.

intention

intention to burden his executor, the judges refused to make him liable \*. The Roman law concerning a *legatum rei alienæ* adheres to the same principle. Where a testator legates a subject as his property, which after his death is discovered to be the property of another, the heir is not bound to give an equivalent, because *deficit voluntas testatoris*. But if the testator knew that the subject was not his, it must have been his will, if he did not mean to be jocular, that it should be purchased by his heir for the legatee; and this implied will was accordingly made effectual by the Pretor as a judge of equity.

## S E C T. IV.

*A deed or covenant that tends not to bring about the end for which it was made.*

WHERE a man exerts an external act, however inconsiderately, he cannot be relieved, *quia factum infectum fieri ne-*

\* Dirleton, 12th November, Stair, 26th November, 1674, Paton contra Stirling; Fountainhall, 22d November 1698, Cumming contra Cumming.

*quit.* But a man making a deed or covenant may be relieved by a sentence of the judge; and will be relieved if a good cause be shown. With respect particularly to the subject of the present section, a deed or covenant, as laid down in the beginning of this chapter, is a mean employed to bring about a certain end or event: whence it follows, that it ought to be voided where it fails to be a mean, or, in other words, where it tends not to bring about the end or event desired. To think otherwise, is to convert a mean into an end, or to adhere to the mean without regard to the end. Common law, regarding the words only, may give force to such a deed or covenant; but equity pierces deeper into the nature of things. Adverting to the fallibility of our nature, it will not suffer one to be bound by such an engagement; and considers, that when he is freed from it, it is only *lucrum cessans* to the party who insists on its performance, not *damnum datum*.

To prevent mistakes in the application of the foregoing doctrine, it is necessary to be observed, that the end here understood is not that which may be secretly in  
view

view of the one or the other party, but that which is spoken out, or understood by both; for a thought retained within the mind, cannot have the effect to qualify an obligation more than to create it. The overlooking this distinction has led Puffendorff into a gross error: who puts the case \*, That a man, upon a false report of all his horses being destroy'd, makes a contract for a new set; and his opinion is, that in equity the purchaser is not bound. This opinion is of a man unacquainted with the world and its commerce. Were mistakes of that kind indulged with a remedy, there would be no end of law-suits. At this rate, if I purchase a quantity of body or table linen, ignorant at the time of a legacy left me of a large quantity, I ought to be relieved in equity, having now no occasion for the goods purchased. And for the same reason, if I purchase a horse by commission for a friend, who happens to be dead at the time of the purchase; there must be a relief in equity, though I made the purchase in my own name. But there is no foundation for this opinion in equity,

\* lib. 3. cap. 6. § 7.



more than at common law. If a subject answer the purpose for which it is purchased, the vender has no farther concern: he is entitled upon delivery to demand the price, without regarding any private or extrinsic motive that might have led his party to make the purchase. In general, a man who exposes his goods to sale must answer for their sufficiency; because there is no obligation in equity to pay a price for goods that answer not the purpose for which they are sold by the one, and bought by the other: but if a purchaser be led into an error or mistake that regards not the subject nor the vender, the consequences must rest upon himself.

I shall only add upon this general head, that the end purposed to be brought about by a deed or covenant ought to be lawful; for to make effectual an unlawful act is inconsistent with the very nature of a court of law. Thus a bond granted by a woman, binding her to pay a sum if she should marry, is unlawful, as tending to bar population; and therefore will be rejected even by a court of common law. And the same fate will attend every obligation granted *ob turpem causam*; a bond,  
for

for example, granted to a woman as a bribe to commit adultery or fornication. So far there is no occasion for a court of equity.

The first example shall be from deeds. Upon a young man living abroad under sentence of forfeiture, his father settled an annuity for life, ignorant that it would fall to the crown. This deed will not bind the granter; for it does not produce the end or effect intended. To sustain it, would be to give force to the mean without regarding the end.

Here a subtle question casts up, What in the view of law is to be held the end upon which the fate of the deed or covenant depends: is a court of equity confined to the immediate end, or may it look forward to consequences. An example will explain the question. In a contract of marriage, the estate is settled on heirs-male of the marriage. The eldest son, being forfeited for high treason, is forced to abandon his native country. The father makes a settlement, excluding him from the succession, in order to prevent his estate from falling to the crown. Can this settlement

settlement be supported by a court of equity? I doubt. The contract of marriage was a proper mean for the end in view, namely, that the estate should descend to the heirs-male of the marriage. The contractors had no farther view; and if a court were to be sway'd by unforeseen consequences, deeds and covenants could not be much relied on. Suppose that after the father's death a pardon is procured for the son, must not this have the effect to void the last settlement, and to restore the son to his right as heir of the marriage? Yet in a case still more delicate, the court of session gave judgement for the father, influenced probably by an overflow of compassion and humanity. James Thomson, in his marriage-contract, provided his estate and conquest to the heirs of the marriage. The heir, a son idle and profligate, became a notour bankrupt; which induced the old man to settle his estate on his grandchildren by that son, burdened with the liferent of the whole to him. A reduction being brought of this settlement as in defraud of the marriage-contract, the court of session repelled the reason of  
reduction,

reduction, and sustained the settlement\*. Beside setting the father free from a rational and solemn contract, there was a very material point in equity against sustaining the settlement, which seems to have been overlooked. What if the whole debts, or the bulk of them, were contracted by the son for necessities before his bankruptcy? On that supposition, the creditors were *certantes de damno vitando*: the children, on the other hand, were *certantes de lucro acquirendo*. Take a different view of the case: What if the bankrupt, by some fortunate adventure, a lottery-ticket for example, had been enabled to pay all his debts: would he not have been entitled as a free man to claim the benefit of the contract of marriage, seeing the only cause for disinheriting him was now removed? If so, a contract of marriage is but an unstable security, as it may depend on future contingencies whether it will be effectual or no.

In questions between husband and wife, a contract of marriage is a contract in the

\* 11th February 1762, Thomson and his Creditors contra his Children.



strictest sense; but in questions with the heirs, it is rather to be considered as a deed; in which light it is viewed above. I proceed now to give examples relative to what are properly contracts. In a contract of sale, the circumstance regarded at common law, is the agreement of the parties, the one to sell the other to purchase the same subject. What are its qualities, whether the price be adequate, and whether it will answer the end for which it is purchased, are left to the regulation of equity. The last belongs to the present section; one instance of which makes a figure in practice, to wit, where goods sold are by some latent insufficiency unfit for the purchaser's use. A horse is bought for a stallion that happens to be geld, or a hoghead of wine for drinking that happens to be sour. If the purchaser be notwithstanding bound, he is compelled to accept goods that are of no use to him, and over and above to pay a full price for what is of little or no value. It would, on the other hand, be to act against conscience, for the vender to take a full price in such a case. Supposing the goods to be sufficient at the time of the bargain, but in-

sufficient

sufficient at the time of delivery, the loss naturally falls on the vender, who continues proprietor till the subject be delivered. If insufficient at the time of the bargain, there is an additional reason for setting it aside, namely error; for error relieves the person who is *certans de damno vitando* against the person who is *certans de damno captando*, which will be more fully explained afterward (a).

A large cargo of strong ale was purchased from a brewer in Glasgow, in order to be exported to New York. In a suit for the price, the following defence was sustained, That having been not properly prepared for the heat of that climate, it had bursted the bottles, and was lost. It was not supposed, that the brewer had been guilty of any wilful wrong; but the defence was sustained upon the following rule of equity, That a man who purchases

(a) The laws of Hindostan go a great way farther against the vender of insufficient goods, farther indeed than either equity or utility will justify. " If  
 " a man have sold rice or wheat for sowing, and  
 " they do not spring up, the vender shall make  
 " good the crop."

goods for a certain purpose, is not bound to receive them unless they answer that purpose; which holds *a fortiori* where the vender is himself the manufacturer. And where the insufficiency cannot be known to the purchaser but upon trial, the rule holds even where the goods are delivered to him. It was also in view, that if the brewer be not answerable for the sufficiency of ale sold by him for the American market, that branch of commerce cannot be carried on \*.

An insolvent debtor makes a trust-right in favour of his creditors; and, among his other subjects, disposes to the trustees his interest in a company-stock. A creditor of the company, who was clearly preferable upon the company-stock before the bankrupt's private creditors, being ignorant of his preference, accedes to the trust-right, and consents to an equal distribution of the bankrupt's effects. Being afterward informed of his preference, he retracts while matters are yet entire. *Quar.* Is he bound by his agreement. He undoubtedly draws by it all the benefit he

\* 13th December 1765, Baird contra Pagan.

had a prospect of; and considering the agreement singly, without relation to the end, he is bound; and so says common law. But equity considers the end and purpose of the agreement; which is, that this man shall draw such proportion of the bankrupt's effects as he is intitled to by law. The means concerted, that he shall draw an equal proportion, contribute not to this end, but to one very different, namely, that he shall draw less than what is just, and the other creditors more. Equity relieves from an engagement where such is the unexpected result; there being no authority from the intendment of parties to make it obligatory where it answers not the purposed end.

Having laid open the foundation in equity for giving relief against a covenant where performance answers not the end purposed by it, I proceed to examine whether there be any relief in equity after the covenant is fulfilled. I buy, for example, a lame horse unfit for work; but this defect is not discovered till the horse is delivered, and the price paid. If the vender hath engaged to warrant the horse as sufficient, he is liable at common law to fulfil



fil his covenant. But supposing this paction not to have been interposed, it appears to me not at all clear, that there is any foundation in equity for voiding the sale thus completed. The horse is now my property by the purchase, and the price is equally the vender's property. If he knew that the horse was lame, he is guilty of a wrong that ought to subject him to the highest damages \* : but supposing him *in bona fide*, I see no ground for any claim against him. The ground of equity that relieves me from paying for a horse that can be of no use, turns now against me in favour of the vender; for why should he be bound to take my horse, of no use to him? The Roman law indeed gave an *actio redhibitoria* in this case, obliging the vender to take back the horse, and to return the price. But I discover a reason for this practice in a principle of the Roman law, that squares not with our practice, nor with that of any other commercial nation. The principle is, That such contracts as are intended to be equal, ought to answer the intention : and therefore in such contracts the Roman Pretor never permitted any

\* l. 13. pr. Actionibus empt.

considerable inequality. Hence the *actio quanti minoris*, which was given to a purchaser who by ignorance or error paid more for a subject than it is intrinsically worth : and it follows upon the same plan of equity, that if a subject be purchased which is good for nothing, the *actio quanti minoris* must resolve into an *actio redhibitoria*. But equity may be carried so far as to be prejudicial to commerce by encouraging law-suits ; and for that reason we admit not the *actio quanti minoris* : the principle of utility rejects it, experience having demonstrated that it is a great interruption to the free course of commerce. The same principle of utility rejects the *actio redhibitoria* as far as founded on inequality ; and after a sale is completed by delivery, I have endeavoured to show, that if inequality be laid aside, there is no foundation for the the *actio redhibitoria*. In Scotland, however, though the *actio quanti minoris* is rejected, the *actio redhibitoria* is admitted where a latent insufficiency unqualifies the subject for the end with a view to which it was purchased. This practice, as appears to me, is out of all rule. If we adhere strictly to equity without regarding utility,

ty, we ought to sustain the *actio quanti minoris*, as well as the *actio redhibitoria*. But if we adhere to utility, the great law in commercial dealings, we ought to sustain neither. To indulge debate about the true value of every commercial subject, would destroy commerce: and for that reason, equity, which has nothing in view but the interest of a single person, must yield to utility, which regards the whole society.

## S E C T. V.

*Equity with respect to a deed providing for an event that now can never happen.*

**T**His section chiefly concerns settlements *intra familiam*, and such like, which on the part of the maker are gratuitous. I cannot easily figure a case relative to a covenant where it can obtain.

A bachelor in a deadly disease, daily expecting death, settles his estate on a near relation, without reserving a power to alter, which he had no prospect of needing. He recovers as by a miracle, and lives  
 2 many

many years. The deed, being in its tenor pure, is effectual at common law. But as death was the event provided for, which did not happen, and as he had no intention to give away his estate from himself, it will not be sustained in equity. And indeed it would be hard to forfeit the poor man for a mistake in thinking himself past recovery. In this example, the failure of the event is accidental, independent of the grantor's will. But equity affords relief, even where the failure is owing to the grantor himself. An old man, on a preamble that he was resolved to die a bachelor, settles his estate on a near relation, reserving his life and power to alter. In dotage, he takes a conceit for a young woman, marries her, but dies suddenly without altering his settlement. Seven or eight months after, a male child is born, who claims the estate. The deed cannot stand in equity, being made for an event that has not fallen out, to wit, the grantor's dying without children. Take another example which depends on the same principle. In the year 1688, the Duchess of Buccleugh obtained from the crown a gift of her husband the Duke of Mon-



mouth's personal estate, which fell under his forfeiture. As by this means their younger son the Earl of Deloraine was left unprovided, she gave him a bond for L. 20,000. The Duke's forfeiture being afterward rescinded, the Earl of Deloraine, executor decerned to him, claimed from his mother the Duke's personal estate. The Duchess was willing to account; but insisted that payment of the bond should be held as part payment of the personal estate. Which was accordingly found \*. Here the event provided for, which was the Earl's being deprived of his legal right by his father's forfeiture, had failed; and consequently the bond could not be effectual in equity. There was beside a still stronger objection against it, namely, that the pursuer had now right to the very subject out of which the bond was intended to be paid.

Cases of this nature are resolved by lawyers into a conditional grant, imply'd, they say, though not expressed. A condition may be imply'd in the case last mentioned; but the circumstances of the two

\* 7th December 1723, Earl Deloraine contra Duchess of Buccleugh.

former will not admit such implication. In the first, the granter is described as having lost all hope of recovery; in which he would not readily think of making his death a condition of the grant. Neither in the other is there any foundation for implying a condition *si sine liberis*, as the granter declared his firm intention to die a bachelor. In cases of this nature, there is no necessity of cutting the Gordian knot by a supposed condition. It is loosed with great facility, by applying to it a maxim, That a deed providing for an event that has failed, cannot in equity be effectual.

## S E C T. VI.

*Errors in deeds and covenants.*

**I**N the beginning of this chapter it is laid down, that the moral sense, respecting the fallibility of our nature, binds us by no engagement but what is fairly done with every circumstance in view; and consequently, that equity will afford relief

against rashness, ignorance, and error. In handling the circumstance last mentioned, it will contribute to perspicuity, that we distinguish errors that move a person to enter into a deed or covenant, from errors that are found in the deed or covenant itself. Errors of the former kind happen more frequently with respect to deeds: of the latter kind, seldom but in contracts. I begin with the first kind, of which the following is an example. My brother having died in the East Indies, leaving children, a boy is presented to me as my nephew, with credentials in appearance sufficient. After executing a bond in his favour for a moderate sum, the cheat is discovered. The moral sense would be little concordant with the fallibility of our nature, did it leave me bound in this case. And supposing the cheat not to be discovered till after my death, a court of equity, directed by the moral sense, will relieve my heir. Here the relief is founded on error solely; for the boy is not said to have been privy to the cheat, or to have understood what was transacting for his behoof. To the same purpose Papinian, "*Falsam causam legato non obesse, verius est*;

“ est : quia ratio legandi legato non co-  
 “ hæret. Sed plerumque doli exceptio lo-  
 “ cum habebit, si probetur alias legaturus  
 “ non fuisse \*.” The circumstances of the  
 following case make it evident, that the  
 error was the sole motive, bringing it un-  
 der the exception mentioned by Papinian.  
 ‘ Pactumeius Androsthenes Pactumeiam  
 ‘ Magnam filiam Pactumeii Magni ex asse  
 ‘ heredem instituerat ; eique patrem ejus  
 ‘ substituerat. Pactumeio Magno occiso,  
 ‘ et rumore perlato quasi filia quoque e-  
 ‘ jus mortua, mutavit testamentum, Novi-  
 ‘ umque Rufum heredem instituit, hac  
 ‘ præfatione : ‘ Quia heredes quos volui  
 “ habere mihi, continere non potui, No-  
 “ vius Rufus heres esto.’ Pactumeia Ma-  
 ‘ gna supplicavit Imperatores nostros ; et,  
 ‘ cognitione suscepta, licet modus institu-  
 ‘ tione contineretur, quia falsus non solet  
 ‘ obesse, tamen ex voluntate testantis pu-  
 ‘ tavit Imperator ei subveniendum : igitur  
 ‘ pronuntiavit, ‘ Hereditatem ad Ma-  
 “ gnam pertinere, sed legata ex posteriore  
 “ testamento eam præstare debere, proinde  
 “ atque si in posterioribus tabulis ipsa

\* l. 72. § 6. De condition. et demonstr.

“ fuisset



“fuiſſet heres ſcripta \*.” The teſtament could not ſtand in equity, proceeding from an erroneous motive. To ſuſtain ſuch a teſtament, would be to diſinherit the favourite heir, contrary to the will of the maker. As to the legacies contained in the latter teſtament, they were juſtly ſuſtained, as there appeared no evidence nor preſumption that the teſtator was moved by an error to grant them.

In many caſes it may be doubted, whether error was the ſole motive, or one of them only. To ſolve that doubt, the nature of the deed will have great influence. A rich man executes a bond for a ſmall ſum in favour of an indigent relation, upon the narrative, that he had behaved gallantly in a battle, where he was not even preſent. Equity will not relieve the grant-er againſt this bond, becauſe charity of itſelf was a good cauſe for granting. The following texts of the *Corpus Juris* belong to the ſame head. ‘Longe magis legato  
‘falſa cauſa adjecta, non nocet: veluti  
‘cum quis ita dixerit, ‘Titio, quia me  
‘abſente negotia mea curavit, ſiſichum  
“do, lego.’ Vel ita: ‘Titio, quia patro-

\* l. ult. De hered. inſtit.

“ cinio ejus capitali crimine liberatus sum,  
 “ stichum do, lego.’ Licet enim neque  
 ‘ negotia testatoris unquam gesserit Titius,  
 ‘ neque patrocínio ejus liberatus sit, lega-  
 ‘ tum tamen valet. Sed si conditionaliter  
 ‘ enunciata fuerit causa, aliud juris est :  
 ‘ veluti hoc modo, ‘ Titio, si negotia mea  
 “ curaverit, fundum meum do, lego \*.”  
 Again : ‘ Quod autem juris est in falsa de-  
 ‘ monstratione, hoc vel magis est in falsa  
 ‘ causa : veluti ita, ‘ Titio fundum do,  
 “ quia negotia mea curavit.’ Item, ‘ Fun-  
 “ dum Titius filius meus præcipito, quia  
 “ frater ejus ex arca tot aureos sumpsit :’  
 ‘ licet enim frater hujus pecuniam ex arca  
 ‘ non sumpsit, utile legatum est †.’

With respect to a deed entirely gratuitous to a person unconnected with the granter, and above taking charity, an error like what is mentioned above, will be held more readily the sole motive; and consequently a ground in equity for voiding the deed.

Where there is any foundation of controversy, a transaction putting an end to it must be effectual; for where there is a

\* § 31. Instit. de légatis.

† l. 17. § 2. De condit. et demonstr.

rational motive for making a deed, the making of it will never be held to proceed from error. But where a man is moved to make a transaction on supposition of a claim that has no foundation, as in the case of a forged deed, he will be relieved from the transaction in equity, the motive being erroneous\*. An unequal transaction may be occasioned by error; but here utility forbids relief; for to extinguish lawsuits, the great source of idleness and discord, is beneficial to every member of society.

We proceed now to errors found in a deed or covenant after it is made. These are of two kinds: one prevents consent altogether; as where the purchaser has one subject in view, the vender another. And as no obligation can arise where there is no agreement, such a covenant, if it can bear that name, is void at common law, and there is no occasion for equity. The other kind is where the error is in the qualities of a subject, not in the subject itself; a purchase, for example, of a horse understood to be an Arabian of true blood, but discovered after to be a mere Ple-

\* l. 42. Cod. De transact.

beian. The bargain is effectual at common law; and the question is, Whether or how far there ought to be a relief in equity.

We begin with errors that regard the subject itself. If in the sale of a horse, the vender intended to sell the horse *A*, the purchaser to buy the horse *B*, there is no agreement: the one did not agree to sell the horse *B*, nor the other to buy the horse *A*. The same must hold in every bargain of sale, whatever the subject be.

Next, where an error respects not the subject, but its qualities. I purchase, for example, a telescope, believing it to be mounted with silver, though the mounting is only a mixed metal. Or, I purchase a watch, the case of which I take to be gold, though only silver gilt. Equity will not relieve me from the bargain, as the instrument equally answers its end, whether more or less ornamented. The most that can result from such an error, is to abate the price, in order to make the bargain equal; and this was done in the Roman law. But a claim of that nature, impeding the free course of commerce, is rejected by commercial nations.



It is a very different case, where the error is such as would have prevented the purchase had it been discovered in time, termed in the Roman law *Error in substantialibus*. Example: A horse is purchased as a stallion for breed; but unknown to both, he happened to be gelded before the bargain. It may be doubted, whether such a bargain be not effectual at common law, as the error is only in the quality of the horse; but undoubtedly it may be set aside in equity, upon a principle mentioned more than once above, That the vender *certans de lucro captando*, ought not to take advantage of the purchaser's error, who is *certans de damno vitando*. Another principle concurs, handled sect. 4. of the present chapter, that one is not bound to fulfil a contract which answers not the proposed end.

We proceed to errors that respect the property of the subject sold. As here the Roman law affords not much light, we have the greater need to proceed warily. I sell to John a horse understood by both of us to be my property. After all is agreed on, it is discovered to be his property. The bargain is void even at common law,

law, as it is incapable of being fulfilled on either side. I cannot convey the property to him, nor can he receive the property from me. It was not my intention to sell a horse that did not belong to me; nor was it his intention to pay for his own horse. The case where the horse belongs to a third person, is in effect the same. I did not intend to sell a horse that belongs not to me; nor did John intend to purchase a horse from me that belongs to a third person. If the mistake be discovered before delivery to John, I am bound in justice to deliver the horse to the proprietor, not to John; and John is under no obligation to pay the price. If the discovery be not made till after John has received the horse and paid the price, there is no obligation on either side, but that I restore the price, as the bargain was void from the beginning.

That the same doctrine ought to obtain in the sale of land, is extremely evident. And as in a sale of land writing is essential, the warrandice contained in the disposition, or in the minute of sale, ought not to go farther than to oblige the vender to repeat the price in case of eviction; un-

less the circumstances of the bargain be such as to justify a more extensive warrandice. Hence it follows, that the clause of warrandice in a disposition or minute of sale of land, even what is termed absolute warrandice, ought to be confined to a repetition of the price upon eviction, unless the vender be further bound in express terms. Yet absolute warrandice here is by the generality of lawyers understood as binding the vender to make up to the purchaser all the loss he sustains by eviction, which in effect is the value of the subject at that time. Whether this be a just conception, deserves the most serious consideration, being of capital importance in the commerce of land.

That the eviction of land ought not to subject the vender to harder terms than the eviction of a moveable, is a doctrine that at least has a plausible appearance. A plausible appearance however is not sufficient: let us enter into particulars, in order to try whether some lurking objection may not be detected that will overturn it. If none can be detected, we may rest secure that the doctrine is solidly founded in principles. In communing about a sale  
of

of land, the title-deeds are produced for the inspection of the purchaser: there is a search of the records; and the bargain is not concluded till the purchaser have full satisfaction that the vender is proprietor. If there happen, after the strictest examination, to be a latent defect in the progress, it is not to be charged on the vender more than on the purchaser. For what good reason then ought he to be made liable for the value of the land as at the time of eviction? The land was understood by both parties to belong to the vender: he wanted to have money for his land; the purchaser to have the land for his money; neither of which purposes can be fulfilled. The purchaser is not bound, because he cannot have the land he bargained for: the vender is not bound, because he agreed to sell his own land, not that of another. Suppose the eviction has taken place while the subject remains with the vender, the minute of sale is void, no less than in the case first mentioned, where the one has it in view to purchase the horse *A*, the other to sell the horse *B*. Nor can it make any difference that the purchaser is infest before eviction. The  
infest-



infestment is void, as taken without consent of the proprietor : and after restoring the price, both parties are free as before they entered into the contract. Upon the whole, the vender must restore the price, because he cannot perform the mutual cause. And as for the purchaser, he can have no claim for the value of the subject evicted ; because there can be no claim, either for a subject or its value, at the instance of a person who has no right to the subject. Add another argument no less conclusive. From a contract binding on no person, no claim can arise to any person ; not even the claim against the vender for restoring the price, which arises not from the contract, but from being in his hand *sine causa*. Hitherto every particular is the same as in the sale of a moveable. The only difference that can found an argument of favour, is on the side of a vender of land. As in the sale of a moveable all rests on the information of the vender ; it might be thought, that more is incumbent on him than on a vender of land, whose affirmation is not relied on, but the progress.

So much for common law. Let us now  
examine,

examine, whether there be any ground in equity for subjecting the vender of land to all the loss that the purchaser may suffer by eviction. A bargain of sale is intended to be fair and equal. The purchaser gets the land, the vender the price, and both are equally accommodated. By eviction, the vender is the only sufferer. Land is seldom aliened but to pay debt. The vender is deprived of the price: his debts remain unpaid; and he is reduced to poverty. But what does the purchaser suffer? He is indeed deprived of what he probably reckons a good bargain; but the price, which is restored to him, will give him the choice of as good a bargain in any corner of Scotland. This is a just state of the case; upon which I put the following question, Is there any equity for subjecting the vender, after restoring the price, to pay what more the land may be worth at the time of eviction? Before answering this question, let the following case be considered. Soon after the purchaser's entry to the land, a valuable lead or coal mine is accidentally discovered, for which the purchaser paid nothing, the parties having had no view to it. This mine  
belongs

belongs to the evictee, and to neither of the contractors. Suppose now the purchase to have been only of a few acres, the mine may intrinsically be worth a hundred times the price. Not satisfied with saying, that I see no equity for obliging the vender to pay this immense sum; I have no hesitation to affirm positively, that it would be highly unjust. This example deserves attention. Would it not require the most express terms in a clause of warranty to oblige the vender to pay such a sum? One thing will certainly be granted me, that such a contract entered into by a facile person, or by a minor even with consent of curators, would be voided without hesitation. There may indeed be good ground to demand caution from the vender to restore the price in case of eviction; considering that venders of land are seldom in opulent circumstances. More cannot justly be demanded.

The hardship is here intolerable, which no man with his eyes open will submit to. But now, supposing, for argument's sake, the purchaser's claim, however much above the price, to be well founded; is there nothing to be said for the vender, where

where the land happens to fall in value below the price? If the purchaser, upon a rise of the market, be intitled to draw from the vender more than the price, ought not the vender to have the benefit of a falling market to pay less than the price? I cannot invent a case where the maxim, *Cujus commodum, ejus debet esse incommodum*, is more directly applicable. It is evident, however, that the vender must restore the price wholly, as the bargain was from the beginning void; and for the same reason, the purchaser can have no claim for more than the price.

Viewing this case with regard to expediency, it is of importance to the public, that the commerce of land, the most useful of all, be free, easy, and equal. If a vender must be so deeply burdened as above, and laid open to such consequences, no man will sell land but in the most pinching necessity. Men at any rate are abundantly averse to sell land, which reduces many to low circumstances; and if this law should obtain, there would be few sales but by public authority. Nor is this all. This law, as to meliorations, would be of no use to the purchaser, who



is secured absolutely without need of oppressing the vender: he is intitled to retain possession, till the evicter make good to him all the expence profitably laid out upon the subject.

Hitherto of a complete progress. Very different is the case where the progress is acknowledged to be incomplete. If in this case the vender be unwilling to sell under the market-price, he must submit to the hazard of eviction, and give warrandice to make up to the purchaser what he loses by eviction, being the value of the subject at the time of eviction. It is a chance-bargain, importing, that if the land sink in value below the price, the purchaser is intitled to that value only; and is intitled to double or triple the price, if the land rise so high in value.

What then is the true import of a clause of absolute warrandice in a sale of land? In the sale of a moveable, there is no warrandice. The vender is held to be proprietor, of which the purchaser is satisfied without requiring warrandice. Neither is there use for warrandice against incumbrances; because a moveable passes from hand to hand, without being subjected to  
any

any incumbrance. But in a sale of land warrandice is necessary; for though there may be no doubt of the vender's right, yet it is proper that the purchaser be secured against incumbrances, to many of which that appear not on record land is subjected. Clauses of warrandice are different, according to the nature of the bargain. In some contracts of sale, the vender gives warrandice against his own facts and deeds only; in some, against the facts and deeds of his predecessors and authors; in some, against all incumbrances whatever; and this last is termed *absolute warrandice*. But of whatever tenor the warrandice be, it will not be understood to guard against a preferable title of property, unless expressed in the clearest terms. The reason is given above, that to extend warrandice so far, where the progress is good and the price adequate, is repugnant to common law, to equity, and to expedience.

The authors of our styles have had a just conception of this matter. Every clause of warrandice I have seen ingrossed in a disposition of land for a just price, and where the progress was held sufficient, is

confined to incumbrances, without any mention of eviction on a preferable right of property. The style follows: "warranting the land from all wards, reliefs, nonentries, marriages of heirs, liferent escheats, recognitions, liferent infestments, annualrents, and from all and sundry other burdens and incumbrances whatever, whereby the land may be evicted, or possession impeded, at all hands, and against all deadly, as law will." Not a syllable of eviction upon a preferable title of property; which, as it cuts deeper than any incumbrance, would be placed in the front were it intended. Nor let the concluding words, *at all hands and against all deadly*, create any doubt; it being an infallible rule in the construction of writs, Never to extend a general clause beyond the particulars to which it is added. This rule holds, even where the general clause is expressed absolutely, without reference to any of the antecedent articles in particular. In the present case, we have scarce occasion for that rule, as the general clause has an immediate reference to incumbrances, and to nothing else.

It

It is admitted by all lawyers, that in the conveyance of claims or debts, absolute warrandice does not secure the purchaser against eviction upon a preferable title; and I am utterly at a loss to see, that the same precise words should have a different meaning in a conveyance of land. Lord Stair indeed endeavours to account for this difference; but without success, as far as I can comprehend. His words are, "Warrandice has no further effect  
 " than what the party warranted truly  
 " paid for the right whereby he was or  
 " might be distressed, though less than  
 " the value of the right warranted. This  
 " will not hold in warrandice of land; as  
 " to which land of equal value, or the  
 " whole worth of what is evicted as it is  
 " at the time of the eviction, is inferred;  
 " because the buyer had the land with the  
 " hazard of becoming better or worse, or  
 " the rising or falling of rates, and therefore is not obliged to take the price he  
 " gave \*." I cannot avoid observing, that two very different subjects are jumbled together in this passage; namely, the purchasing a competing right in order to pre-

\* Institut. book 2. title 3. sect. 46.



vent eviction, and the effect of warrandice where land is actually evicted. These are different propositions depending on different principles, and entirely unconnected; yet are opposed to each other as if they were parts of the same proposition. Can any accuracy be expected in such a manner of handling a question? His Lordship beside stops short in the middle. In the case of rising of rates, the purchaser, says he, is not obliged to take the price he gave. Not a word upon the case of falling of rates. His Lordship upon maturer thinking would have seen, that as the subject never belonged to the purchaser, he could have no claim for it or its value against the vender; and he also would have seen, that from a contract binding neither party, no claim can arise to either party. But this is not all. I am at a loss to conceive that the hazard of becoming better or worse, can be of any weight in this case. One thing I clearly conceive, that if this circumstance have any weight, it will make absolute warrandice to have the same effect in the conveyance of debts, that it is said to have in the conveyance of land. Real debts produced in a ranking

ing are commonly at first of uncertain value. An adjudication is purchased for a trifle, which, by objections sustained against competing creditors, draws at the conclusion a large sum. There is here perhaps more hazard of becoming better or worse, than in the purchase of land: yet, after the purchaser of the adjudication has laid out a considerable sum in obtaining a high place in the ranking, he has upon eviction no claim against the vender but for the price he paid: he must rely on the evicter for recovering the expence of process. Sensible I am from my own experience, how difficult it is to guard against errors in the hurry of composition. Lord Stair was an able lawyer; and, not to mention the case of a mine discovered after the purchase, had he but thought on useful improvements laid out by the purchaser, he certainly would not have thought it reasonable that the vender should be liable for the value of these, considering that the evicter is bound for it. The following scene might have occurred to his Lordship. After adjusting the progress and the price, "Nothing remains," says the intended purchaser, "but that you  
 " warrant

“warrant the expence I intend to lay out  
 “upon inclosing, planting, and other im-  
 “provements. Are you not secured by  
 “law?” answers the vender: “you are in-  
 “titled to retain possession till you obtain  
 “full satisfaction from the evicter. You  
 “have thus real warrandice, and need  
 “not the addition of personal.” “I insist  
 “however for your warrandice,” replies  
 the other: “one cannot be made too se-  
 “cure.” “After being absolutely secure,”  
 rejoins the vender, “beyond the possibi-  
 “lity of a disappointment, your demand  
 “for my warrandice has no meaning but  
 “to have it in your power to oppress me.  
 “A demand so irrational proves you ei-  
 “ther to be a fool or a knave: I reject all  
 “dealing with you.” As no man of sense  
 would advise the vender to submit to that  
 demand, I hold it as demonstration, that  
 the expence of profitable improvements  
 cannot be understood to be comprehended  
 in a clause of absolute warrandice. As to  
 voluptuary expences, termed so by Ro-  
 man writers, the law, it is true, gives no  
 security in case of eviction; nor is there  
 reason for it. A man embellishes his per-  
 son, his house, his fields, in order to make

a figure. In case of a voluntary sale, he reckons not upon any additional price for a fine garden, and as little in case of eviction. And were the vender to be made liable, it would oblige venders to be extremely cautious about the person they sell to; no man could sell an acre or two without the hazard of absolute ruin. Upon these acres the purchaser erects a palace, adorns his gardens with temples, triumphal arches, cascades, &c. &c. sufficient to exhaust the riches of a nabob. The poor vender all this while sits trembling at every joint for fear of eviction.

I put a case the most favourable that can be for the purchaser, to which the argument urged by Lord Stair is directly applicable. By a gradual rise of the market without a farthing laid out on it, the land purchased thirty years ago has risen in value a third or fourth part above the price paid for it. There lies no claim against the evicter for this additional value; and it is so much lost to the purchaser if the vender be not liable. This probably is the case his Lordship had in view. If the vender, *major, sciens, et prudens*, bound himself to make up that loss, he must sub-



mit. But I state a plain question, Is there any thing in justice, or in the nature of a contract of sale, to lay this risk on the vender? In making the bargain, both parties are equally *in bona fide*, the progress is held to be good by both; and both are losers; not equally indeed, for the vender, who must restore the whole price, is the greatest loser. Say, what is it that intitles the purchaser to draw from the vender the present value of the land? Not the contract, for a contract that does not bind can produce no action: not the property of the land, which did not pass to the purchaser. The only remaining foundation I can think of, is to claim that loss on the footing of damage. Neither can this hold, as there can be no claim for damage, except from express paction or from a delict; and the case supposed admits of neither. Nor could Lord Stair have a view to either, when the opinion he gives is founded solely on the rising or falling of rates.

This interesting point of law was judicially handled in a late process, Lord Napier *contra* the Representatives of Mr William Drummond, who sold the estate of  
Edinbelly

Edinbelly to his Lordship. The progress had been held sufficient by the purchaser; and the warrandice was in the ordinary style, the same that is above mentioned. It was found however by decree of the court of session, "That the representatives of Mr William Drummond are liable to Lord Napier for the value of the estate of Edinbelly, evicted from him, as the same was at the time of eviction \*."

This judgement has a formidable appearance against the doctrine above inculcated. Yet as far as could be gathered from the reasoning of the judges, what moved them was not the terms of the absolute warrandice, but the two following arguments: First, That possessors of land ought not to be discouraged from making ornamental improvements; and, next, That though many evictions must have happened, there is not on record a single instance of a process for eviction: whence it was presumed, that the present value must have been submitted to by the vender, otherwise that it would have been demanded from him in a process. And the inference was, that

\* 6th August 1776.

it is now too late to alter a practice so long established. To the first answered, That the possessor has absolute security for profitable improvements, which, as beneficial to the public, deserve every encouragement; but that ornamental improvements, being a species of luxury, are entitled to no favour; and were they intitled, that the evicter only ought to be subjected, as they were occasioned by his delay or negligence; especially as he now has the pleasure of them. Answered to the second, The presumption lies clearly on the other side. No man who has produced a progress to the satisfaction of the purchaser, will upon eviction find himself bound in conscience to pay the present value of the land, including all the improvements, voluptuary as well as profitable. And as there is no instance of a decree against the vender for that value, there is the highest probability that the demand has never exceeded the price, which will always be admitted without a process. As for embellishments in particular, the taste for them is but creeping in; and they are so rare in Scotland, as to afford no probability

lity that they ever were claimed upon eviction.

The arguments I have endeavoured to obviate, were spoken out; but what I conjecture chiefly influenced the judges, was the authority of Lord Stair; which could not fail to have great weight, considering that for a course of years it had been inculcated into every student as a rule of law, and adopted by every member of the court. Men, who in early youth have sucked in a maxim whether of law or of religion, are impregnable by argument. Much superior to that of reason must the authority be, which can operate a conversion. In matters arbitrary and doubtful, I cheerfully submit to the authority of eminent writers, to that especially of Lord Stair, who is our capital writer on law. But neither reason nor common sense will justify such deference, with regard to points that are resolvable into principles.

But now, waving that subject, I have another attack to make on his Lordship, and on its offspring the late judgement of the court, which will open the eyes of our men of law, if any thing can. Though his Lordship's opinion respects voluntary sales



sales only, yet it must equally hold in judicial sales, as the fluctuating value of land is the same whether sold publicly or privately. Yet this opinion is not made the rule in judicial sales. The practice is, that each creditor gives warrandice against eviction to the extent of what he draws of the price; justly, because the creditors cannot retain the price, if the purchaser be deprived of the land. But warrandice is never exacted from them for the value of the land in case of eviction. This has not only been the uniform practice from the commencement of judicial sales, but is a practice authorized by an express act of federunt \*, declaring, "That the creditors preferred to the price, shall, upon payment, dispoſe to the purchaser their rights and diligences, with warrandice *quoad* the sums received by them; so that in case of eviction of the lands disposed, they shall be liable to refund these sums in whole or in part effecting to the eviction. And this is declared to be the import of any former obligations of warrandice given by creditors in the case foresaid." Here we have

\* last of March 1685.

constant and uniform practice for a long course of time, authorised by the supreme court of the nation; which equals in authority an act of parliament. Now as, with respect to the present point, no difference can be figured between a public and a private sale, the rule laid down for the former must equally obtain with regard to the latter, were the case of the latter otherwise doubtful. Had the practice in public sales been suggested to the court, or had it occurred to any of the judges, we may rest with assurance, that a different judgement would have been given in the case of Lord Napier.

I have insensibly been led, from the close and concise manner of a didactic work, into a sort of dissertation. But the importance of the subject will I hope plead for me.

Hitherto of errors discovered in the contract itself. We proceed to errors arising in the performance of a contract. Under this head comes erroneous payment, or *solutio indebiti*, as termed in the Roman law. Of this there are two kinds; one where payment is erroneously made of an extinguished debt, supposed to be subsisting; and

and one where a debt really subsisting is paid by a man who mistakes himself to be the debtor. To judge rightly of the former, the following preliminaries will pave the way. The sale of a subject as existing which does not exist, is void: the vender cannot deliver a *non ens*; and the purchaser is not bound to pay the price unless he get what he bargained for. In like manner, where an extinguished debt is assigned, understood to be subsisting, the assignment is void; and if the price have been paid, it must be restored on discovery of the error. This doctrine is applicable to the case in hand. As it is unjust in a creditor to take twice payment, he can have no pretext for detaining the second payment made erroneously by the debtor. The same must follow, where the second payment has been made to the creditor's heir, who, though *in bona fide*, can have no better right than his predecessor had. The same will also follow in the case of an executor-creditor\*. An assignee to a debt extinguished by payment obtains payment from

\* Stair, Gosford, 10th January 1673, Ramsay contra Robertson.

the debtor's heir; both of them being ignorant of the former payment. The error is discovered *rebus integris*. The heir must have back the money he paid, being in the hands of the assignee *sine causa*; and the assignee is intitled to draw from the cedent the price he paid for a *non ens*. So far clear. But what if the error be discovered several years after, when the cedent happens to be insolvent. This intricate case is handled above, where it comes in more properly. There it is laid down, that the assignee having been deprived of his recourse against the cedent by the debtor's rashly paying the debt a second time, neglecting to look into his affairs, the loss ought to rest on him. The argument is still stronger for the assignee, where a debt is purchased on condition that the debtor's heir grant a bond of corroboration. This bond indeed corroborating a *non ens* cannot be effectual; but as the purchase was made on the faith of it, the loss occasioned by the cedent's bankruptcy, ought to fall on the heir, who was at least rash or incautious, not on the purchaser, who acted prudently. And when



the price he paid to the cedent is made up to him by the heir, matters are restored to their original state, as if the bargain had not been made. There may be bargains against which there can be no restitution; as where a bond is assigned to a husband in name of tocher with his wife, which happens to be corroborated by the debtor's heir before it was assigned to the husband. As the marriage was made on the faith of the bond of corroboration, the granter of the bond can have no relief, but must pay the whole to the husband. And so says Paulus: "Si quis indebitam pecuniam, per errorem, jussu mulieris, sponso ejus promississet, et nuptiæ secutæ fuissent, exceptione doli mali uti non potest. Maritus enim suum negotium gerit; et nihil dolo facit, nec decipiendus est: quod fit, si cogatur indotatam uxorem habere. Itaque adversus mulierem condictio ei competit; ut aut repetat ab ea quod marito dedit, aut ut liberetur, si nondum solverit \*."

We proceed to the case where a debt really subsisting is paid by a man who er-

\* l. 9. § 1. De condict. causa data.

roneously understands himself to be the debtor. This case has divided the Roman writers. To the person who thus pays erroneously, Pomponius gives a *condictio indebiti* \*. Paulus is of the same opinion †. Yet this same Paulus, in another treatise, refuses action ‡. The solution of this question seems not to be difficult. Were it the effect of the erroneous payment to extinguish the debt, a *condictio* could not be sustained against the creditor: a man who does no more but receive payment of a just debt, cannot be bound to repeat. But the following reasons evince, that a debt is not extinguished by erroneous payment. First, There is nothing that can hinder the creditor, upon discovery of the mistake, to restore the money, and to hold by the true debtor. Second, The true debtor, notwithstanding the erroneous payment, is intitled to force a discharge from the creditor, upon offering him payment; which he could not do were the debt already extinguished. Hence it follows, that the creditor holds the putative debt-

\* l. 19. § 3. De condict. indeb.

† l. 65. § ult. eod.

‡ l. 44. eod.

or's money *sine justa causa*; and consequently, that a *condictio indebiti* against him is well founded. But the circumstance that operates in the case first mentioned, where there exists no debt, operates equally here. Upon receiving payment *bona fide* from the putative debtor, the creditor thinks no more of a debt he considers to be extinguished; and therefore, if the real debtor become insolvent after the payment, the inconsiderateness of the putative debtor will subject him to the loss; which may instruct him to be more circumspect in time coming.

With respect to payment erroneously made by the debtor to one who is not the creditor, see book 2. chap. 5.

The legal consequences of the payment of a debt by a man who knows himself not to be the debtor, are handled book 1, part 2. at the end,

SECT.

S E C T. VII.

*A deed or covenant being void at common law as ultra vires, can a court of equity afford any relief?*

A Principle in logics, That will without power cannot produce any effect, is applicable to matters of law; and is thus expressed, That a deed *ultra vires* is null and void. Common law adheres rigidly to this principle, without distinguishing whether the deed be wholly beyond the power of the maker, or in part only. If it be one deed, it admits of no division at common law, but must be totally effectual or totally void. The distinction is reserved to a court of equity, which gives force to every rational deed as far as the maker's power extends. Take the following illustrations.

If one having power to grant a lease for ten years grants it for twenty, the lease is in equity good for ten years\*. For here

\* 1. Chancery cases 23.

there



there can be no doubt about will; and justice requires, that the lease stand good as far as will is supported by power. A tack set by a parson for more than three years without consent of the patron, is at common law void totally, but in equity is sustained for the three years \*. But a college having set a perpetual lease of their teinds for 50 merks yearly, which teinds were yearly worth 200 merks; and the lease being challenged for want of power in the makers, who could not give such a lease without an adequate consideration, it was found totally null, and not sustained for any limited time or higher duty †. For a court of equity, as well as a court of common law, must act by general rules; and here there was no rule for ascertaining either the endurance of the lease, or the extent of the duty. Further, a court of equity may separate a deed into its constituent parts, and support the maker's will as far as he had power: but here the li-

\* Stair, 18th July 1668, Johnston contra Parishioners of Hoddam.

† Stair, 13th July 1669, Old College of Aberdeen contra the Town.

miting the endurance and augmenting the duty so as to correspond to the power of the makers, would be to frame a new lease, varying in every article from the lease challenged.

By the act 80. parl. 1579, " All deeds  
 " of great importance must be subscribed  
 " and sealed by the parties, if they can  
 " write; otherwise by two notaries before  
 " four witnesses, present at the time, and  
 " designed by their dwelling-places; and  
 " the deeds wanting these formalities shall  
 " make no faith." With respect to this statute, a deed is held by the court of session to be of great importance when what is claimed upon it exceeds in value L. 100. And upon the statute thus constructed, it has often been debated, Whether a bond for a greater sum than L. 100 subscribed by one notary only and four witnesses, or two notaries and three witnesses, be void; or whether it ought to be sustained to the extent of L. 100. A court of common law, adhering to the words of the statute, will refuse action upon it. And such was the practice originally of the court of session

sion \*. But a court of equity, regarding the purpose of the legislature, which is to make additional checks against falsehood in matters of importance; will support such deeds to the extent of L. 100 : for a deed becomes of small importance when reduced to that sum, and ought to be supported upon the ordinary checks. And accordingly the court of session, acting in later times as a court of equity, supports such bonds to the extent of L. 100 †. But in applying the rules of equity to this case, the bond ought to be for a valuable consideration, or at least be rational: if irrational, it is not intitled to any support from equity.

Oral evidence is not sustained in Scotland to prove a verbal legacy exceeding L. 100, but if it be restricted to that sum, witnesses are admitted ‡.

When arbiters take upon them to determine articles not submitted, the award or

\* Hope, (Obligation), November 29, 1616, Gibson contra Executors of Edgar; Durie, 13th November 1623, Marshall contra Marshall.

† Dictionary of Decisions, (Indivisible).

‡ Durie, 7th July 1629, Wallace contra Muir; Durie, 1st December 1629, Executrix of Scot contra Raes.

decreet-arbitral is at common law void even as to the articles submitted. A decreet-arbitral is considered as one entire act, which must stand or fall *in totum*. Equity, prone to support things as far as rational, separates the articles submitted from those not submitted, and sustains the proceedings of the arbiters as far as they had power. Thus, if two submit all actions subsisting at the date of the submission, and the arbitrators release all actions to the time of the award, the award shall be good for what is in the submission, and void for the residue only \*. A decreet-arbitral being challenged, as *ultra vires compromissi* with respect to mutual general discharges which were ordered to be granted, though some particular claims only were submitted; the decreet-arbitral was sustained as far as relative to the articles submitted, and found void as to the general discharges only †. Arbiters having decreed a sum to themselves and their clerk, for which the submission gave no

\* New abridgement of the law, vol. 1. p. 139. 140.

† Fountainhall, 25th December 1702, Crawford contra Hamilton.



authority; yet the decreet-arbitral, as far as supported by the submission, was found good even at common law, so as to have the privilege of the regulations 1695, not to be liable to any objection but falsehood, bribery, and corruption. Upon this ground, an objection of iniquity was repelled as incompetent \*. Here the objection of iniquity had but an indifferent look: an objection carrying a strong appearance of justice, would probably have been better received.

Family-settlements are commonly more complex than any of the cases mentioned above, consisting of many parts interwoven so intimately, that if one be withdrawn as *ultra vires*, the rest must tumble. There is no remedy but to adjust the will to the present circumstances, in such a manner as the maker himself would have done had he foreseen the event. Take the following examples. A man having two sons, John and James, makes a deed, settling upon them his estate, consisting of two baronies, to John one of the baronies, the other to James. John's part is evicted by one having a preferable right. The deed, as far

\* March 1777, Jack contra Cramond.

as in favour of James, will be supported at common law, which regards the words only without piercing deeper. But a court of equity considers, that to give to one of the brothers the whole that remains of the estate, and nothing to the other, is inconsistent with the will of the maker, who proportioned his estate between them in the same deed by a single act of will. Therefore to support that will as far as the present circumstances can admit, the court will divide the remaining estate between the brothers, in the same proportion that the whole was divided by the maker. And this may be done boldly; as being what the granter himself would have done, had he foreseen the event. The following example is of the same kind. A man settles his estate of L. 1000 yearly rent on his eldest son, burdened with L. 8000 to his eight other children. A farm making half of the estate is evicted. The children notwithstanding claim their whole provision; which perhaps would be sustained at common law, as there is no condition expressed. But assuredly, the provision was not intended to be made effectual, even though there should not remain a shilling

to the heir. In order to fulfil the maker's will as far as the present circumstances admit, a court of equity will restrict the provision to L. 4000, which is giving to the younger children the same proportion of their father's effects that was originally intended. But let it be remarked, that the result will be different where there is a bond of provision for L. 8000, and the estate settled on the heir by a different deed, or left to be taken up *ab intestato*. He will be subjected to all the debts, and to the bond of provision among the rest. Take a third example. A man having three daughters, settles his land-estate on the eldest, with competent provisions to the other two. As this settlement happened to be made on deathbed, it was reduced by the younger sisters, who by that means came to be heirs-portioners with the eldest. Can they claim their provisions over and above? Here the whole was done in the same deed, and by a single act of will. It was not the intention of the father, that the eldest should have the estate independent of her sister's provisions; and as little that they should have their provisions independent of their eldest sister's right to the

the estate. A court of equity, therefore, to support the father's deed as far as possible, will reject the claim for the provisions. The younger sisters disobeying their father's will, are not permitted to take any benefit from it. Equity suffers no person to approbate and reprobate the same deed. The younger sisters, therefore, if they adhere to their reduction, must give up their provisions. The following is a similar example. John Earl of Dundonald, by a deed of entail, settled his land-estate on his heirs-male; with the same breath settled his moveables by a testament; and executed bonds of provision to his daughters. These several writings, done *unico contextu* in pursuance of one act of will, and making a complete settlement of his estate real and personal, remained with him undelivered. After the Earl's death, certain lands contained in the entail being found to be still remaining *in hereditate jacente* of a remote predecessor, they were claimed by the daughters as heirs of line. It was objected, That the whole settlement was one act of will, and one deed, though in different writings; that the pursuers could not approbate and reprobate;  
and



and that therefore, if they claimed the lands contrary to their father's will, they could take no benefit by that will. It was accordingly found, That the pursuers might chuse either, but could not have both \*.

The settlement of an estate by marriage-articles upon the heirs of the marriage, is not intended to bar the husband from a second marriage, or from making rational provisions to the issue of that marriage. A man thus bound makes exorbitant provisions to the issue of a second marriage, such as his whole estate, or the greater part. This settlement, as a breach of engagement, is wholly void at common law; and it is a matter of delicacy for a court of equity to interpose where there is no rule for direction. It would, however, be inconsistent with common sense, that children should suffer as much by excess of affection in their father, as by his utter neglect. As it would be a reproach on law, that the children should be left without remedy, the court of session ventures

\* 20th February 1729, Countess of Strathmore and Lady Catharine Cochrane contra Marquis of Clydesdale and Earl of Dundonald.

to interpose, by sustaining the provisions to such an extent as to be consistent with the engagement the father came under in his first contract of marriage. The court, however, never interposes without necessity; and if common law afford any means for providing the children, the matter is left to common law. The following case will illustrate this observation. Colonel Campbell, being bound by marriage-articles to provide to the issue the sum of 40,000 merks, with the conquest, did, by a deathbed-settlement, appoint his eldest son to be heir and executor; leaving it upon the Duke of Argyle and the Earl of Ilay to name rational provisions to his younger children. The referees having declined to act, the younger children insisted to have the settlement voided, as contradictory to the marriage-articles. It was urged for the heir, That the Colonel had power to divide the special sum and conquest, by giving more to one child and less to another; and that though the whole happens to be settled on the eldest son, by accident not by intention, it belongs to the court of session to remedy the inequality, by doing what was expected from the referees,

namely,

namely, to appoint rational provisions to the younger children. The court voided the settlement totally; which intitled the children *per capita* to an equal division of the subjects provided to them in the marriage-contract \*.

## S E C T. VIII.

*Where there is a failure in performance.*

**I**N order to distinguish equity from common law upon this subject, we begin with examining what power a court of common law has to compel persons to fulfil their engagements. That this court has not power to decree specific performance, is an established maxim in England, founded upon the following reason, That in every engagement there is a term for performance; before which term there can be no demand; and after the term is past, performance at the term is impletable †.

\* 22d December 1739, Campbell contra Campbells.

† See Vinnius's commentary upon § 2. De verborum obligationibus. Institutes.

A court of common law, confined to the words of a writing, hath not power to substitute equivalents; and therefore all that can be done by such a court, is to award damages against the party who has failed. Even a bond of borrowed money is not an exception; for after the term of payment, the sum is ordered to be paid by a court of common law, not as performance of the obligation, but as damage for not performance. This, it must be acknowledged, is a great defect; for the obvious intention of the parties in making a covenant, is not to have damages, but performance. The defect ought to be supplied; and it is supplied by a court of equity upon a principle often mentioned, That where there is a right it ought to be made effectual. By every covenant that is not conditional, there is a right acquired to each party; a term specified for performance is a mean to ascertain performance, not a condition; and when that mean fails, it is the duty of a court of equity to supply another mean, that is, to name another day.

To illustrate this doctrine, several cases shall be stated. In a minute of sale of land,



a term is specified for entering the purchaser into possession, and for paying the price. The matter lies over till the term is past, without a demand on either side. At common law, the minute of sale is rendered ineffectual; because possession cannot be delivered, nor the price be paid, at a term that is now past: neither can damage be awarded for non-performance, as neither of the contractors has been *in mora*. But the remedy is easy in a court of equity; namely, to assign a new term for specific performance; which fulfils the purpose of the covenant, and makes the rights therefrom arising effectual. But the naming a new term for performance, must vary the original agreement. The price cannot bear interest from the term named in the minute, because the purchaser got not possession at that term: nor is the vender liable from that term to account for the rents, because he was not bound to yield possession till the price should be offered. These several prestations must take place from the new term named by the court of equity.

Supposing now a *mora* on one side. The purchaser,

purchaser, for example, demands performance at the term stipulated; and years pass in discussing the vender's defences. These being over-ruled, the purchaser insists for specific performance. What doth equity suggest in this case? for now, the term of performance being past, performance cannot be made in terms of the original articles. One thing is evident, that the purchaser must not suffer by the vender's failure; and therefore, a court of equity, though it must name a new term for performance, may, at the instance of the purchaser, appoint an account to be made on the footing of the original articles. If the rent exceed the interest of the price, the balance may be justly claimed by the purchaser. But what if the interest of the price, as usual, exceed the rent? The vender will not be intitled to the difference; because no man is intitled to gain by his failure. In a word, the purchaser can claim damage in the former case, so far as he loses by the vender's failure. But in the latter case, he gains by the failure, and has no damage to claim. This, at first view, may seem to clash with the maxim, *Cujus commodum, ejus*

*debet esse incommodum.* There is no clashing in reality: the vender suffers justly for his failure; but the purchaser cannot suffer, who was always ready to perform. This gives the true sense of the maxim, That it holds only between persons who are upon an equal footing; not between persons where the one is guilty the other innocent. I need scarce add, that the option given to the purchaser upon the vender's *mora*, is given to the vender upon the purchaser's *mora*.

It frequently happens that specific performance is unobtainable; as where I sell the same horse first to John, and then to James. The performance to John becomes unobtainable after the horse is delivered to James; and therefore, instead of specific performance, a court of equity must be satisfied, like a court of common law, to decree damages to John; according to the maxim, *Loco facti impræstabilis succedit damnum et interesse.*

This suggests an inquiry, whether in awarding damages there be any difference between common law and equity. An obligor, bound to perform what he undertakes, ought to make up the loss occasioned

fioned by his failure; and such failure accordingly affords a good claim for damages at common law as well as in equity. Thus, the purchaser of an estate from an apparent heir, having, along with the disposition, received a procuratory to serve and infest the apparent heir, employs his own doer to perform that work. By the doer's remissness, the heir-apparent dies without being infest, which renders the disposition ineffectual. The doer is bound at common law to make up the purchaser's loss, though it be *lucrum cessans* only; and a court of equity can go no further. In cases of that nature, if skill be professed, unskilfulness will not afford a defence. "Proculus ait, si me-  
 "dicus servum imperite secuerit, vel lo-  
 "cato vel ex lege Aquilia competere ac-  
 "tionem \*. Celsus etiam imperitiam cul-  
 "pæ adnumerandum scripsit. Si quis vi-  
 "tulos pascendos vel sarcendum quid  
 "poliendumve conduxit, culpam eum  
 "præstare debere; et quod imperitia pec-  
 "cavit, culpam esse; quippe ut artifex  
 "conduxit †." Upon this rule the fol-

\* l. 7. § 8. Ad legem Aquil.

† l. 9. § 5. Locati conducti.



lowing case was determined. An advocate being debtor to his client, wrote and delivered him a bill of exchange for the sum. Being sued for payment, he objected, That the bill was null, containing a penalty. The advocate probably was ignorant that this was a nullity; but he undertook the trust of drawing the bill, and therefore was bound for its sufficiency \*. Where a prisoner for debt makes his escape, it must be admitted, that the creditor is hurt in his interest; but he cannot prove any damage; for it is not certain that he would have recovered payment by detaining the debtor in prison, and it is possible he may yet recover it. But to be deprived of the security he has by his debtor's imprisonment, is undoubtedly a hurt or prejudice; and the common law gives reparation by making the negligent jailor liable for the debt, as equity doth in similar cases. A messenger who neglects to put a caption in execution, affords another instance of the same kind. By his negligence he is subjected to the debt, which is said to be *litem suam facere*.

\* 26th November 1743, Garden contra Thomas Rigg Advocate.

The undertaking an office implies an agreement to fulfil the duty of the office : negligence accordingly is a breach of agreement, which subjects the officer to all consequences, whether actual damage or other prejudice. At the same time, it ought not to escape observation, that as neglect singly without intention of mischief is no ground for punishment, damages are the only means within the compass of law for compelling a man to be diligent in his duty. So far the remedy afforded by a court of common law is complete, without necessity of recurring to a court of equity.

Certain covenants unknown to common law, belong to a court of equity. This was the case of a bill of exchange, before it was brought under common law by act of parliament ; and while it continued in its original state, damages from failure of performance could not be claimed but in a court of equity. A policy of insurance is to this day unknown at common law ; and consequently every wrong relative to it must be redressed in a court of equity.

And now as to the rules for estimating actual damage upon failure to perform a covenant,

covenant. A failure of duty, whether the duty arise from a covenant, or from any other cause, is a fault only, not a crime; and upon such failure no consequential damage that is uncertain ought to be claimed\*. There is the greatest reason for this moderation with respect to covenants, where the failure is often occasioned by a very slight fault, and sometimes by inability without any fault. This rule is adopted by writers on the Roman law:

“ Cum per venditorem steterit quo minus  
 “ rem tradat, omnis utilitas emptoris in  
 “ æstimationem venit: quæ modo circa  
 “ ipsam rem consistit. Neque enim, si  
 “ potuit ex vino puta negotiari, et lucrum  
 “ facere, id æstimandum est, non magis  
 “ quam si triticum emerit, et ob eam rem  
 “ quod non sit traditum, familia ejus fa-  
 “ me laboraverit: nam pretium tritici,  
 “ non fervorum fame necatorum, conse-  
 “ quitur †.” “ Venditori si emptor in  
 “ pretio solvendo moram fecerit, usuras  
 “ duntaxat præstabit, non omne omnino  
 “ quod venditor, mora non facta, conse-  
 “ qui potuit; veluti si negotiator fuit, et,

\* See above, p. 98.

† l. 21. § 3. Empti et venditi.

“ pretio

“ pretio soluto, ex mercibus plus quam ex  
“ usuris quærere potuit \*.”

At a slight view it might be thought, that to reject uncertain damage here is inconsistent with what is laid down above concerning a jailor or a messenger. But upon a more accurate view it will appear, that uncertain damage is not admitted in either case. The creditor's risk upon escape of his prisoner is certain, however uncertain the consequences may be. It is this risk only that is estimated; and it is estimated in the most accurate manner, by relieving the creditor, and laying it on the jailor or messenger. Upon the whole, with respect to estimating actual damage from breach of covenant, there appears no defect in common law more than in estimating risk, to make the interposition of equity necessary.

Hitherto of a total failure. Next where the failure is partial only. Many obligations are of such a nature as to admit no medium between complete performance and total failure. Other obligations admit a partial performance, and conse-

\* l. 19. De peric. et commod. rei vend.



quently a failure that is but partial. A bargain and sale of a horse furnishes examples of both. The vender's performance is indivisible: if he deliver not the horse, his failure is total. The obligation on the purchaser to pay the price, admits a performance by parts: if he have paid any part of the price, his performance is partial, and his failure partial.

Many obligations *ad facta præstanda* are of the last kind. A waggoner who engages to carry goods from London to Edinburgh, and yet stops short at Newcastle, has performed his bargain in part, and consequently has failed only in part. The like, where a ship freighted for a voyage, is forced, by stress of weather, to land the cargo before arriving at the destined port. In cases of that kind the question is, What is the legal effect of a partial failure. The answer is easy at common law, which takes the bargain strictly according to the strict meaning of the words. I am not bound to pay the price or wages till the whole goods be delivered as agreed on. But in order to answer the question in equity, a culpable failure must be distinguished from a failure occasioned by accident

dent or misfortune : a culpable failure can expect no relief from equity ; the rule being general, That equity never interposes in favour of a wrong-doer : but where the failure is occasioned by accident or misfortune, the price or wages will be due in proportion to what part of the work has been done ; and the claim rests on the following maxim, *Nemo debet locupletari aliena jactura*. Thus, where a man undertakes to build me a house for a certain sum, and dies before finishing, his representatives will be entitled to a part of the sum, proportioned to the work done ; for in that proportion I am *locupletior aliena jactura*. And in the case above mentioned, if the waggoner die at Newcastle, or be prevented by other accident from completing his journey, he or his executors will have a good claim *pro rata itineris*. By the same rule, the freight is due *pro rata itineris*, as was decreed Lutwidge *contra Gray* \*.

A process was lately brought before the court of session upon the following fact. Mariners were hired at Glasgow to per-

\* See the Dictionary, title (*Periculum*).

form a trading voyage, first to Newfoundland, next to Lisbon, and last to the Clyde. A certain sum per month was agreed on for wages, to be paid when the voyage should be completed. The Glasgow cargo was safely landed in Newfoundland; and a cargo of fish, received there, was delivered at Lisbon. In the homeward passage, the ship with the Lisbon cargo being taken by a French privateer, the mariners, when liberated from prison, claimed their wages *pro rata itineris*. This cause was compromised. It can scarce however admit of a doubt, but that the rule, *Pro rata itineris*, must hold with respect to mariners, as well as with respect to the freighter of a ship. And accordingly it is a common saying, That the freight is the mother of the seamen's wages; meaning, that where the former is due, the latter must also be due.

What is said above is applicable to a lease. A lease, in its very nature supposes a subject possessed by one, for the use of which he pays a yearly sum to another: the possession and rent are mutual causes of each other, and cannot subsist separately. Land set in lease happens to be swallowed

lowed up by the sea : this puts an end to the lease. Here the failure is total. A total sterility is in effect the same. Let us now suppose the sterility to be partial only. What says common law ? It says, that such sterility will not intitle the lessee to any deduction of rent ; that he must abandon the farm altogether, or pay the whole rent. In the following case, several rules of equity concerning sterility are opened. In January 1755, Foster and Duncan set to Adamson and Williamson a salmon-fishing in the river Tay, opposite to Errol, on the north side of a shallow, named the *Guinea-bank*, to endure for five years. The river there is broad ; but the current, being narrow, passed at that time along the north side of the said bank, the rest of the river being dead water. As one cannot fish with profit but in the current, the lessees made large profits the first two years, and were not losers the third ; but the fourth year the current changed, which frequently happens in that river, and instead of passing as formerly along the north side of the bank, passed along the south side, which was a part of the river let to others ; by which means the fishing let to Adamson



son and Williamson became entirely unprofitable during the remainder of their lease. The granters of the lease having brought a process against the lessees for L. 36 Sterling, being the rent for the two last years, the defence was, a total sterility by the change of the current as aforesaid; and a proof being taken, the facts appeared to be what are above stated. It was pleaded for the pursuers, That whatever may be thought with respect to a total sterility during the whole years of the lease, or during the remaining years after the lease is offered to be given up, the sterility here was temporary only: for as the stream of the river Tay is extremely changeable, it might have returned to its former place in a month, or in a week; and as the lessees adhered to the lease, and did not offer to surrender the possession, they certainly were in daily expectation that the current would take its former course. A tenant cannot pick out one or other sterility year to get free of that year's rent: if equity afford him any deduction, it must be upon computing the whole years of the lease; for if he be a gainer upon the whole, which is the present case, he has no claim  
in

in equity for any deduction. It was carried, however, by a plurality, to sustain the defence of sterility, and to assoilzie the defenders from the rent due for the last two years. This judgement seems no better founded in equity than at common law. And it is easy to discover what moved the plurality : In a question between a rich landlord and a poor tenant, the natural bias is for the latter : the subject in controversy may be a trifle to the landlord, and yet be the tenant's all. Let us put an opposite case. A widow with a numerous family of children has nothing to subsist on but her liferent of a dwelling-house, and of an extensive orchard. These she leases to a gentleman in opulent circumstances, for a rent of L. 15 for the house, and L. 25 for the orchard. He possesses for several years with profit. The orchard happens to be barren the two last years of the lease, and he claims a deduction upon that account. No one would give this cause against the poor widow. Such influence have extraneous circumstances, even where the judges are not conscious of them.

Partial failure has hitherto been considered

dered in its consequences with respect to the person who has failed to execute a commission. I proceed to the effect of a failure with respect to those who give the commission. A submission is a proper example. It being the professed intention of a submission to put an end to all the differences that are submitted, the arbiters, chosen to fulfil that intention, are bound by acceptance to perform. An award or decret-arbitral is accordingly void at common law, if any article submitted be left undecided; for in that case the commission is not executed. Nor will such a decret-arbitral be sustained in a court of equity, where claims made by the one party are sustained, and the other left to a process; which is partial and unfair. But where the claims are all on one side, and some of them only decided, equity will support the decret-arbitral; it being always better to have some of the claims decided than none. But in this case, the decret-arbitral, so far as it goes, must be unexceptionable; for a court of equity will never support a deed or act void at common law, except as far as it is just.

## S E C T. IX.

*Indirect means employed to evade performance.*

A Mong persons who are sway'd by interest more than by conscience, the employing indirect means to evade their engagements, is far from being rare. Such conduct, inconsistent with the candor and *bona fides* requisite in contracting and in performing contracts, is morally wrong; and a court of equity will be watchful to disappoint every attempt of that kind. Thus, if a man, subjected to a thirlage of all the oats growing on his farm that he shall have occasion to grind, sell his own product of oats, and buy meal for the use of his family, with no other view but to disappoint the thirlage; this is a wrong *contra bonam fidem contractus*, which will subject him to the multure that would have been due for grinding the oats of his own farm. The following case is an example of the same kind. A gentleman be-



ing abroad, and having no prospect of children, two of his nearest relations agreed privately, that if the estate should be disposed to either, the other was to have a certain share. The gentleman, ignorant of this agreement, settled his estate upon one of them, reserving a power to alter. The dispositive sent his son privately to Denmark, where the gentleman resided : upon which the former deed was recalled, and a new one made upon the son. In a process, after the gentleman's death, for performance of the agreement, the defence was, That the agreement had not taken place, as the disposition was not in favour of the defendant, but of his son. The court judged, That the defendant had acted fraudulently in obtaining an alteration of the settlement, in order to evade performance of the agreement; and that no man can take benefit by his fraud. For which reason he was decreed to fulfil the engagement, as if the alteration had not been made \*.

\* Stair, 15th July 1681, Campbell contra Moir.

## C H A P. V.

Powers of a court of equity to remedy what is imperfect in common law with respect to statutes.

**C**ONsidering the nature of a court of common law, there is no reason that it should have more power over statutes than over private deeds. With respect to both it is confined to the words; and must not pretend to pronounce any judgement upon the spirit and meaning in opposition to the words. And yet the words of a statute correspond not always to the will of the legislature; nor are always the things enacted proper means to answer the end in view; falling sometimes short of the end, and sometimes going beyond it. Hence to make statutes effectual, there is the same necessity for the interposition of a court of equity, that there is with respect to deeds and covenants. But in order to

form a just notion of the powers of a court of equity with respect to statutes, it is necessary, as a preliminary point, to ascertain how far they come under the powers of a court of common law; and with that point I shall commence the enquiry.

Submission to government is universally acknowledged to be a duty: but the true foundation of that duty seems to lie in obscurity, though scarce any other topic has filled more volumes. Many writers derive this duty from an original compact between the sovereign and his people. Be it so. But what is it that binds future generations? for a compact binds those only who are parties to it; not to mention that governments were established long before contracts were of any considerable authority\*. Others, dissatisfied with this narrow foundation, endeavour to assign one more extensive, deriving the foregoing duty from what is termed in the Roman law a *quasi-contract*. "It is a rule," they say, "in law, and in common sense, That a man who lays hold of a benefit, must take it with its conditions, and submit to its necessary consequences. Thus one

\* See Historical law-tracts, tract 2.

" who

“ who accepts a succession, must pay the  
“ ancestor’s debts : he is presumed to a-  
“ gree to this condition, and is not less  
“ firmly bound than by an explicit en-  
“ gagement. In point of government,  
“ protection and submission are recipro-  
“ cal ; and the taking protection from  
“ a lawful government, infers a consent to  
“ submit to its laws.” This ground of  
submission is not much more extensive than  
the former ; for both proceed upon the  
supposition, that without consent expressed  
or imply’d no person owes obedience to  
government. At this rate, the greater part  
of those who live under government are  
left in a state of independency ; for seldom  
is there occasion to afford such peculiar  
protection to private persons, as necessarily  
to infer their consent. Consider farther,  
that the far greater part of those who live  
in society, are not capable to understand  
the foregoing reasoning : many of them  
have not even the slightest notion of what  
is meant by the terms *protection* and *sub-  
mission*. I am inclined therefore to think,  
that this important duty has a more solid  
foundation ; and, comparing it with other  
moral duties, I find no reason to doubt,  
that



that like them it is rooted in human nature \*. If a man be a social being and government be essential to society, it is not conformable to the analogy of nature, that we should be left to an argument for investigating the duty we owe our rulers. If justice, veracity, gratitude, and other private duties, be supported and enforced by the moral sense, it would be strange if nature were deficient with respect to the public duty only. But nature is not deficient in any branch of the human constitution : government is no less necessary to society, than society to man ; and by the very frame of our nature we are fitted for government as well as for society. To form originally a state or society under government, there can be no means, it is true, other than compact ; but the continuance of a state, and of government over multitudes who never have occasion to promise submission, must depend on a different principle. The moral sense, which binds individuals to be just to each other, binds them equally to submit to the laws of their society ; and we have a clear con-

\* See Essays on the principles of morality and natural religion, part 1. ess. 2. chap. 7.

viction that this is our duty. The strength of this conviction is no where more visible than in a disciplined army. There, the duty of submission is exerted every moment at the hazard of life; and frequently where the hazard is imminent, and death almost certain. In a word, what reason shows to be necessary in society, is, by the moral sense, made an indispensable duty. We have a sense of fitness and rectitude in submitting to the laws of our society; and we have a sense of wrong, of guilt, and of meriting punishment, when we transgress them (a).

Hence

(a) In examining this matter, it would not be fair to take under consideration statutes relating to justice, because justice is binding independent of municipal law. Consider only things left indifferent by the law of nature, which are regulated by statute for the good of society; the laws, for example, against usury, against exporting corn in time of dearth, and many that will occur upon the first reflection. Every man of virtue will find himself bound in conscience to submit to such laws. Nay, even with respect to those who by interest are moved to transgress them, I venture to affirm, that the first acts, at least, of transgression, are seldom perpetrated with a quiet mind. I will not even except what is called *smuggling*; though private interest authorised by example, and

Hence it clearly follows, that every voluntary transgression of what is by statute ordered to be done or prohibited, is a moral wrong, and a transgression of the law of nature. This doctrine will be found of great importance in the present inquiry.

Many differences among statutes must be kept in view, in order to ascertain the powers of a court of common law con-

and the trifle that is lost to the public by any single transgression, obscure commonly the consciousness of wrong; and perhaps, after repeated acts, which harden individuals in iniquity, make it vanish altogether. It must however be acknowledged, that the moral sense, uniform as to private virtue, operates with very different degrees of force with relation to municipal law. The laws of a free government, directed for the good of the society, and peculiarly tender of the liberty of the subject, have great and universal influence: they are obeyed cheerfully as a matter of strict duty. The laws of a despotic government, on the contrary, contrived chiefly to advance the power or secure the person of a tyrant, require military force to make them effectual; for conscience scarce interposes in their behalf. And hence the great superiority of a free state, with respect to the power of the governors as well as the happiness of the subjects, over every kingdom that in any degree is despotic or tyrannical.

cerning them. Some statutes are compulsory, others prohibitory; some respect individuals, others the public; of some the transgression occasions damage, of others not; to some a penalty is annexed, others rest upon authority.

I begin with those which rest upon authority, without annexing any penalty to the transgression. The neglect of a compulsory statute of this kind will found an action at common law to those who have interest, ordaining the defendant either to do what the statute requires, or to pay damages. If, again, the transgression of a prohibitory statute of the same kind harm any person, the duty of the court is obvious: The harm must be repaired, by voiding the act where it can be voided, such as an alienation after inhibition; and where the harm is incapable of this remedy, damages must be awarded. This is fulfilling the will of the legislature, being all that is intended by such statutes.

But from disobeying a statute, prejudice often ensues, which, not being pecuniary, cannot be repaired by awarding a sum in name of damages. Statutes relating to the public are for the most part of this nature;



and many also in which individuals are immediately concerned (a). To clear this point, we must distinguish as formerly between compulsory and prohibitory statutes. The transgression of a prohibitory statute is a direct contempt of legal authority, and consequently a moral wrong, which ought to be redressed; and where no sanction is added, it must necessarily be the purpose of the legislature to leave the remedy to a court of law. This is a clear inference, unless we suppose the legislature guilty of prohibiting a thing to be done, and yet leaving individuals at liberty to disobey with impunity. To make the will of the legislature effectual in this case, different means must be employ'd according to the nature of the subject. If an act done *prohibente lege* can be undone, the most effectual method of redressing the wrong is to void the act. If the act cannot be undone, the only means left is punishment. And accordingly, it is a rule in

(a) This branch, by the general distribution, ought regularly to be handled afterward, part 2. of this first book; but by joining it here to other matters with which it is intimately connected, I thought it would appear in a clearer light.

the law of England \*, that an offender for contempt of the law, may be fined and imprisoned at the King's suit (a).

On the other hand, the transgression of a compulsory statute ordering a thing to be done, infers not necessarily a contempt of legal authority. It may be an act of omission only, which is not criminal ; and it will be construed to be such, unless from collateral circumstances it be

(a) If this doctrine to any one appear singular, let it be considered, that the power insisted on is only that of authorising a proper punishment for a crime after it is committed, which is no novelty in law. Every crime committed against the law of nature, may be punished at the discretion of the judge, where the legislature has not appointed a particular punishment; and it is made evident above, that a contempt of legal authority is a crime against the law of nature. But to support this in the present case, an argument from analogy is very little necessary; for, as observed above, it is obviously derived from the will of the legislature. I shall only add, that the power of naming a punishment for a crime after it is committed, is greatly inferior to that of making a table of punishments for crimes that may be committed hereafter, which is a capital branch of the legislative authority.

\* 2. Instit. 163.

made evident, that there was an intention to condemn the law.' Supposing then the transgression to be an act of omission only, and consequently not an object of punishment, the question is, What can be done, in order to fulfil the will of the legislature. The court has two methods: one is, to order the statute to be fulfilled; and if this order be also disobey'd, a criminal contempt must be the construction of the person's behaviour, to be followed, as in the former case, with a proper punishment. The other is, to order the thing to be done under a penalty. I give an example. The freeholders are by statute bound to convene at Michaelmas, in order to receive upon the roll persons qualified; but no penalty is added to compel obedience. In *odium* of a freeholder who desires to be put upon the roll, they forbear to meet. What is the remedy here where there is no pecuniary damage? The court of session may appoint them to meet under a penalty. For, in general, if it be the duty of judges to order the end, they must use such means as are in their power. And if this can be done with respect to a private person, it follows, that where a thing

thing is ordered to be done for the good of the public, it belongs to the court of session, upon application of the King's Advocate, to order the thing to be done under a penalty. In a process at the instance of an heritor intitled to a salmon-fishing in a river, against an inferior heritor, for regulating his cruive and cruive-dike, concluding, That he should observe the Saturday's flap; that the hecks of his cruives should be three inches wide, &c. it was decreed, That the defendant should be obliged to observe these regulations under the penalty of L. 50 Sterling. It was urged for the defendant, That the pursuer ought to be satisfied with damages upon contravention, because the law has imposed no penalty, and the court can impose none. Answered, That it is beyond the reach of art to ascertain damage in this case; and therefore that to enforce these regulations a penalty is necessary. And if this remedy be neglected by the legislature, it must be supplied by a court of equity upon the principle, That if there be a right it ought to be made effectual.

What next come under consideration are statutes forbidding things to be done under



der a penalty; for to the omission of a thing ordered to be done, a penalty is seldom annexed. These are distinguishable into two kinds. The first regard the more noxious evils, which the legislature prohibits absolutely; leaving the courts of law to employ all the means in their power for repressing them; but adding a penalty beforehand, because that check is not in the power of courts of law. The second regard flightier evils, to repress which no other means are intended to be applied but a pecuniary penalty only. Both kinds are equally binding in conscience; for in every case it is a moral wrong to disobey the law. Disobedience however to a statute of the second class, is attended with no other consequence but payment of the penalty; whereas the penalty in the first class is due, as we say, *by and attour performance*; and for that reason, a court of law, beside inflicting the penalty, is bound to use all the means in its power to make the will of the legislature effectual, in the same manner as if there were no penalty. And even supposing that the act prohibited is capable of being voided by the sentence of a court, the penalty ought still to be

be inflicted; for otherwise it will lose its influence as a prohibitory means.

Prohibitory statutes are often so inaccurately expressed, as to leave it doubtful whether the penalty be intended as one of the means for repressing the evil, or the only means. This defect occasions in courts of law much conjectural reasoning, and many arbitrary judgements. The capital circumstance for clearing the doubt, is the nature of the evil prohibited. With respect to every evil of a general bad tendency, it ought to be held the will of the legislature, to give no quarter: and consequently, beside inflicting the penalty, it is the duty of courts of law to use every other mean to make this will effectual. With respect to evils less pernicious, it ought to be held the intention of the legislature, to leave no power with judges beyond inflicting the penalty. This doctrine will be illustrated by the following examples. By the act 52. parl. 1587. "He who bargains for greater profit than 10 *per cent.* shall be punished as an usurer." Here is a penalty without declaring such bargains null: and yet it has ever been held the intendment of this act to discharge

charge usury totally; and the penalty is deemed as one mean only of making the prohibition effectual. There was accordingly never any hesitation to sustain action for voiding usurious bargains, nor even to make the lender liable for the sums received by him above the legal interest. This then is held to be a statute of the first class. The following statutes belong to the second class. An exclusive privilege of printing books, is given to authors and their assigns for the term of fourteen years. Any person who within the time limited prints or imports any such book, shall forfeit the same to the proprietor, and one penny for every sheet found in his custody; the half to the King, and the other half to whoever shall sue for the same \*. With respect to the monopoly granted by this statute, it has been justly established, that a court of law is confined to the penalty, and cannot apply other means for making it effectual, not even an action of damages against an interloper †. “Members of the college of justice are

\* 8. Ann. 18.

† June 7. 1748, Bookfellers of London contra Bookfellers of Edinburgh and Glasgow.

“ discharged to buy any lands, teinds, &c.  
“ the property of which is controverted in  
“ a process, under the certification of lo-  
“ sing their office \*.” It has been always  
held the sense of this statute, to be satisfied  
with the penalty, without giving authority  
to reduce or void such bargains.

But though contracts or deeds contrary  
to statutory prohibitions of the kind last  
mentioned are not subject to reduction, it is  
a very different point, Whether it be the duty  
of courts of law to sustain action upon such  
a contract or deed. And yet this distinc-  
tion seems to have been overlooked in the  
court of session: for it is the practice of  
that court, while they inflict the penalty,  
to support with their authority that very  
thing which is prohibited under a penalty.  
Thus, a member of the college of justice,  
buying land while the property is contro-  
verted in a process, is deprived of his of-  
fice; and yet, with the same breath, action  
is given him to make the minute of sale

\* Act 216. parl. 1594.



effectual \*. This, in effect, is considering the statute, not as prohibitory of such purchases, but merely as laying a tax upon them, similar to what at present is laid upon plate, coaches, &c. I take liberty to say, that this is a gross misapprehension of the spirit and intendment of the statute. Comparing together the statutes contained in both classes, both equally are prohibited: the difference concerns only the means employ'd for making the prohibition effectual. To repress the less noxious evils, the statutory penalty is thought sufficient: to repress the more noxious evils, beside inflicting the statutory penalty, a court may employ every lawful mean in its power. But evidently both are intended to be repressed; and justly, because both in different degrees are hurtful to the society in general, or to part of it. This article is of no slight importance. If I have set in a just light the spirit and intendment of the foregoing statutes, it follows of conse-

\* Haddington, June 5. 1611, Cunninghame contra Maxwell; Durie, July 30. 1635, Richardson contra Sinclair; Fountainhall, December 20. 1683, Purves contra Keith.

quence,

quence, that an act prohibited in a statute of the second class ought not to be countenanced with an action, more than an act prohibited in a statute of the first class. Courts of law were instituted to enforce the will of the national legislator, as well as of the Great Legislator of the universe, and to put in execution municipal laws as well as those of nature. What shall we say then of a court that supports an act prohibited by a statute, or authorises any thing contradictory to the will of the legislature? It is a transgression of the same nature, though not the same in degree, with that of sustaining action for a bribe promised to commit murder or robbery. With regard then to statutes of this kind, though a court is confined to the penalty, and cannot inflict any other punishment, it doth by no means follow, that action ought to be sustained for making the act prohibited effectual: on the contrary, to sustain action would be flying in the face of the legislature. The statute, for example, concerning members of the college of justice, is satisfied with the penalty of deprivation, without declaring the bargain

null; and therefore to sustain a reduction of the bargain would be to punish beyond the words, and perhaps beyond the intention, of the statute. But whether action should be sustained to make the bargain effectual, is a consideration of a very different nature: the refusing action is made necessary by the very constitution of a court of law; it being inconsistent with the design of its institution, to enforce any contract or any deed prohibited by statute. It follows indeed from these premises, that it is left optional to the vender to fulfil the contract or no at his pleasure; for if a court of law cannot interpose, he is under no legal compulsion. Nor is this a novelty. In many cases beside the present, the rule is applicable, *Quod potior est conditio possidentis*, where an action will not be given to compel performance, and yet if performance be made, an action will as little be given to recall it.

Pondering this subject sedately, I can never cease wondering to find the practice I have been condemning extended to a much stronger case, where the purpose of the legislature to make an absolute prohibition is clearly expressed. The case I have  
in

in view relates to the revenue-laws, prohibiting certain goods to be imported into this island, or prohibiting them to be imported from certain places named. To import such goods, or to bargain about their importation, is clearly a contempt of legal authority ; and consequently a moral wrong, which the smuggler's conscience ought to check him for, and which it will check him for, if he be not already a hardened sinner. And yet, by mistaking the nature of prohibitory laws, actions in the court of session have been sustained for making such smuggling-contracts effectual. They are not sustained at present ; nor I hope will be. “ Non dubium est, in legem committere eum, qui verba legis amplexus, contra legis nititur voluntatem. Nec poenas insertas legibus evitabit, qui se contra juris sententiam sæva prærogativa verborum fraudulenter excusat. Nullum enim pactum, nullam conventionem, nullum contractum inter eos videri volumus subsequutum, qui contrahunt lege contrahere prohibente. Quod ad omnes etiam legum interpretationes, tam veteres quam novellas, trahi generaliter imperamus ; ut legislatori quod fieri non vult, tantum prohibuisse



“hibuisse sufficiat : cæteraque, quasi expressa, ex legis liceat voluntate colligere : hoc est, ut ea, quæ lege fieri prohibentur, si fuerint facta, non solum inutilia, sed pro infectis etiam habeantur : licet legislator fieri prohibuerit tantum, nec specialiter dixerit *inutile esse debere quod factum est* \*.”

So much upon the powers of a court of common law with respect to statutes. Upon the whole it appears, that this court is confined to the will of the legislature as expressed in the statutory words. It has no power to rectify the words, nor to apply any means for making the purpose of the legislature effectual, other than those directed by the legislature, however defective they may be. This imperfection is remedied by a court of equity, which enjoys, and ought to enjoy, the same powers with respect to statutes that are explained above with respect to deeds and covenants. To give a just notion of these powers concerning the present subject, the following distinction will contribute. Statutes, as far as they regard matter of law and come under the cognisance of a court of equity,

\* 1. s. C. De legibus.

may be divided into two classes. First, Those which have justice for their object, by supplying the defects, or correcting the injustice, of common law. Second, Those which have utility for their sole object. Statutes of the first class are intended for no other purpose but to enlarge the jurisdiction of courts of common law, by empowering them to distribute justice where their ordinary powers reach not: such statutes are not necessary to a court of equity, which, by its original constitution, can supply the defects and correct the injustice of law: but they have the effect to limit the jurisdiction of a court of equity; for the remedies afforded by them must be put in execution by courts of common law, and no longer by a court of equity. All that is left to a court of equity concerning a statute of this kind, is to supply the defects and correct the injustice of common law, as far as the statute is incomplete or imperfect; which, in effect, is supplying the defects of the statute. But it is not a new power bestowed upon a court of equity as to statutes that are imperfect: the court only goes on to exercise its wonted powers with respect to matters of justice that

that are left with it by the statute, and not bestowed upon courts of common law. I explain myself by an example. When goods were wrongously taken away, the common law of England gave an action for restitution to none but to the proprietor; and therefore when the goods of a monastery were pillaged during a vacancy, the succeeding abbot had no action. This defect in law with respect to material justice, would probably have been left to the court of chancery, had its powers been unfolded when the statute of Marlebirge supplying the defect was made\*; but no other remedy occurring, that statute impowers the judges of common law to sustain action. Had the statute never existed, action would undoubtedly have been sustained in the court of chancery: all the power that now remains with that court, is to sustain action where the statute is defective. The statute enacts, "That the successor shall have an action against such transgressor, for restoring the goods of the monastery." Attending to the words singly, which a court of common law must do, the remedy is incomplete;

\* 52. Henry III. cap. 29.

for trees cut down and carried off are not mentioned. This defect in the statute, is supplied by the court of chancery. And Coke observes, that a statute which gives remedy for a wrong done, shall be taken by equity. After all, it makes no material difference, whether such interposition of a court of equity, be considered as supplying defects in common law, or as supplying defects in statutes. It is still enforcing justice in matters which come not under the powers of a court of common law.

Statutes that have utility for their object, are of two kinds. First, Those which are made for promoting the positive good and happiness of the society in general, or of some of its members in particular. Second, Those which are made to prevent mischief. Defective statutes of the latter kind may be supplied by a court of equity; because, even independent of a statute, that court hath power to make regulations for preventing mischief. But that court hath not, more than a court of common law, any power to supply defective statutes of the former kind; because it is not impowered originally to interpose in any matter that hath no other tendency but merely to promote the posi-



tive good of the society. But this is only mentioned here to give a general view of the subject: for the powers of a court of equity as directed by utility are the subject of the next book.

Having said so much in general, we are prepared for particulars; which may commodiously be distributed into three sections. First, Where the will of the legislature is not justly expressed in the statute. Second, Where the means enacted fall short of the end purposed by the legislature. Third, Where the means enacted reach unwarily beyond the end purposed by the legislature.

## S E C T. I.

*Where the will of the legislature is not justly expressed in the statute.*

**T**HIS section, for the sake of perspicuity, shall be divided into three articles. First, Where the words are ambiguous. Second, Where they fall short of will. Third, Where they go beyond will.

ART. I.

ART. I. *Where the words are ambiguous.*

THE following is a proper instance. By the act 250. parliament 1597, " Vassals  
 " failing to pay their feu-duties for the  
 " space of two years, shall forfeit their  
 " feu-rights, in the same manner as if a  
 " clause irritant were ingrossed in the in-  
 " feftment." The forfeiting clause here is  
 ambiguous: it may mean an *ipso facto*  
 forfeiture upon elapsing of the two years;  
 or it may mean a forfeiture if the feu-du-  
 ty be not paid after a regular demand in a  
 process. Every ambiguous clause ought to  
 be so interpreted as to support the rules of  
 justice, because such must be constructed  
 the intendment of the legislature: and that  
 by this rule the latter sense must be chosen,  
 will appear upon the slightest reflection.  
 The remedy here provided against the ob-  
 stinacy or negligence of an undutiful vas-  
 sal, could never be intended a trap for the  
 innocent, by forfeiting those who have  
 failed in payment through ignorance or  
 inability. The construction chosen ma-  
 king the right voidable only, not void *ipso*  
*facto*,

*facto*, obliges the superior to insist in a declarator of irritancy or forfeiture, in order to void the right; which gives the vassal an opportunity to prevent the forfeiture, by paying up all arrears. By this method, it is true, the guilty may escape: but this is far more eligible in common justice, than that the innocent be punished with the guilty.

ART. II. *Where the words fall short of will.*

IN the act of Charles II. laying a tax on malt-liquors, there are no words directing the tax to be paid, but only a penalty in case of not payment. The exchequer, which, like the session, is a court both of common law and of equity, supplies the defect; and, in order to fulfil the intendment of the statute, sustains an action for payment of the tax.

ART. III. *Where the words go beyond will.*

BY the act 5. parl. 1695, it is enacted,  
“That hereafter no man binding for and  
“ with

“ with another conjunctly and several-  
“ ly, in any bond or contract for sums  
“ of money, shall be bound longer than  
“ seven years after the date of the bond.”

It appearing to the court, from the nature of the thing, and from other clauses in the statute, that the words are too extensive, and that the privilege was intended for none but for cautioners upon whose faith money is lent, they have for that reason been always in use to restrict the words, and to deny the privilege to other cautioners.

The act 24. parl. 1695, for making effectual the debts of heirs who after three years possession die in apparenacy, is plainly contrived for debts only that are contracted for a valuable consideration. The act however is expressed in such extensive terms, as to comprehend debts and deeds, gratuitous as well as for a valuable consideration. The court therefore, restricting the words to the sense of the statute, never sustains action upon this statute to gratuitous creditors.

The regulations 1695, admitting no objection against a decreet-arbitral but bribery and corruption only, reach unwarily beyond



beyond the meaning of the legislature. A decret-arbitral derives its force from the submission; and for that reason every good objection against a submission must operate against the decret-arbitral.

By the statute 9<sup>o</sup> *Annæ*, cap. 13. "The  
" person who at one time loses the sum or  
" value of L. 10 Sterling at game, and  
" pays the same, shall be at liberty with-  
" in three months to sue for and recover  
" the money or goods so lost, with costs  
" of suit. And in case the loser shall not  
" within the time foresaid really and *bona*  
" *fide* bring his action, it shall be lawful  
" for any one to sue for the same, and  
" triple value thereof, with costs of suit."

Here there is no limitation mentioned with respect to the popular action: nor, as far as concerns England, is it necessary; because, by the English statute 31<sup>st</sup> Eliz. cap. 5. "No action shall be sustained upon  
" any penal statute made or to be made,  
" unless within one year of the offence."

A limiting clause was necessary with regard to Scotland only, to which the said statute of Elizabeth reacheth not; and therefore, as there is no limitation expressed in the act, a court of common law in  
Scotland

Scotland must sustain the popular action for forty years, contrary evidently to the will of the legislature, which never intended a penal statute to be perpetual in Scotland, that in England is temporary. As here, therefore, the words go beyond will, it belongs to the court of session to limit this statute, by denying action if not brought within one year after the offence. Hence, in the decision January 19. 1737, Murray *contra* Cowan, where an action was sustained even after the year, for recovering money lost at play with the triple value, the court of session acted as a court of common law, and not as a court of equity.

The following is an instance from the Roman law with respect to the *hereditatis petitio*, of words reaching inadvertently beyond the will of the legislator. “ Illud  
“ quoque quod in oratione Divi Hadriani  
“ est, *Ut post acceptum judicium id auctori*  
“ *praestetur, quod habiturus esset, si eo tempore,*  
“ *quo petit, restituta esset hereditas, inter-*  
“ *dum durum est : quid enim, si post li-*  
“ *tem contestatam mancipia, aut jumenta,*  
“ *aut pecora deperierint ? Damnari debe-*  
“ *bit secundum verba orationis : quia po-*  
“ tuit

“ tuit petitor, restituta hereditate, distra-  
 “ xisse ea. Et hoc justum esse in speciali-  
 “ bus petitionibus Proculo placet : Cassius  
 “ contra fenfit. In prædonis persona Pro-  
 “ culus recte existimat : in bonæ fidei  
 “ possessoribus Cassius. Nec enim debet  
 “ possessor aut mortalitatem præstare, aut  
 “ propter metum hujus periculi temere in-  
 “ defensum jus suum relinquere \*.”

## S E C T. II.

*Where the means enacted fall short of the end  
 purposed by the legislature.*

THE first instance shall be given of  
 means that afford a complete remedy  
 in some cases, and fall short in others *ubi  
 par est ratio*. In order to fulfil justice, the  
 will of the legislature may be made effec-  
 tual by a court of equity, whatever defect  
 there may be in the words. Take the fol-  
 lowing examples. In the Roman law, Ul-  
 pian mentions the following edict. “ Si  
 “ quis id quod, jurisdictionis perpetuæ

\* l. 40. De hereditatis petitione.

“ causa, in albo, vel in charta, vel in alia  
 “ materia propositum erit, dolo malo cor-  
 “ ruperit; datur in eum quingentorum  
 “ aureorum iudicium, quod popolare est.”

Upon this edict Ulpian gives the follow-  
 ing opinion. “ Quod si, dum proponitur,  
 “ vel ante propositionem, quis corruperit;  
 “ edicti quidem verba cessabunt; Pompo-  
 “ nius autem ait sententiam edicti porri-  
 “ gendam esse ad hæc \*.”

“ Oratio Imperatorum Antonini et Com-  
 “ modi, quæ quasdam nuptias in personam  
 “ senatorum inhibuit, de sponsalibus nihil  
 “ locuta est: recte tamen dicitur, etiam  
 “ sponsalia in his casibus ipso jure nullius  
 “ esse momenti; ut suppleatur, quod ora-  
 “ tioni deest †.”

“ Lex Julia, quæ de dotali prædio pro-  
 “ spexit, Ne id marito liceat obligare, aut  
 “ alienare, plenius interpretanda est: ut  
 “ etiam de sponso idem juris sit, quod de  
 “ marito ‡.”

By the statute of Gloucester, “ A man  
 “ shall have a writ of waste against him

\* l. 7. § 2. De iurisdic.

† l. 16. De sponsalibus.

‡ l. 4. De fundo dotali.



“ who holdeth for term of life or of years \*.”

This statute, which supplies a defect in the common law, is extended against one who possesses for half a year or a quarter. For (says Coke) a tenant for half a year being within the same mischief shall be within the same remedy, though it be out of the letter of the law †.

An heir, whether apparent only, or entered *cum beneficio*, cannot act more justly with respect to his predecessor's creditors, than to bring his predecessor's estate to a judicial sale. The price goes to the creditors, which is all they are intitled to in justice; and the surplus, if any be, goes to the heir, without subjecting him to trouble or risk. The act 24. parl. 1695, was accordingly made, empowering the heir-apparent to bring to a roup or public auction his predecessor's estate, whether bankrupt or not. But as there is a solid foundation in justice for extending this privilege to the heir entered *cum beneficio*, he is understood as omitted *per incuriam*; and the court of session supplied the defect, by sustaining a process at the instance of the heir

\* 6. Edward I. cap. 5.

† 1. Instit. 54. b.

*cum beneficio*, for selling his predecessor's estate \*.

By the common law of Scotland, a man's creditors after his death had no preference upon his estate: the property was transferred to his heir, and the heir's creditors came in for their share. This was gross injustice; for the ancestor's creditors, who lent their money upon the faith of the estate, ought in all views to have been preferred. The act 24. parl. 1661, declares, "That the creditors of the predecessor doing diligence against the apparent heir, and against the real estate which belonged to the defunct, within the space of three years after his death, shall be preferred to the creditors of the apparent heir." The remedy here reaching the real estate only, the court of session completed the remedy, by extending it to the personal estate †, and also to a personal bond limited to a substitute named ‡. And, as being a court of equity, it was well authorised to make this extension; for to

\* Feb. 27 1751, Patrick Blair.

† Stair, Dec. 16. 1674, Kilhead contra Irvine.

‡ Forbes, Feb. 9. 1711, Graham contra Macqueen.

withdraw from the predecessor's creditors part of his personal estate, is no less unjust than to withdraw from them part of his real estate.

One statute there is, or rather clause in a statute, which affords a plentiful harvest of instances. By the principles of common law an heir is intitled to continue the possession of his ancestor; and formerly, if he could colour his possession with any sort of title, however obsolete or defective, he not only enjoy'd the rents, but was enabled by that means to defend his possession against the creditors \*. Among many remedies for this flagrant injustice, there is a clause in the act 62. parl. 1661, enacting, "That in case the apparent heir of  
" any debtor shall acquire right to an ex-  
" pired apprising, the same shall be re-  
" deemable from him, his heirs and suc-  
" cessors, within ten years after acquiring  
" of the same, by the posterior apprisers,  
" upon payment of the purchase-money." This remedy has been extended in many particulars, in order to fulfil the end intended by the legislature. For, *1mo*, Tho'

\* See Historical law-tracts, tract 12. toward the close.

the remedy is afforded to apprifers only, it is extended to perfonal creditors. *2do*, It has been extended even to an heir of entail, empowering him to redeem an apprifing of the entailed lands, after it was purchafed by the heir of line. *3tio*, Though no purchafe is mentioned in this claufe but what is made by the heir-apparent, the remedy however is extended againft a prefumptive heir, who cannot be heir-apparent while his ancestor is alive. *4to*, It was judged, That an apprifing led both againft principal and cautioner, and purchafed by the heir-apparent of the principal, might be redeemed by the creditors of the cautioner. This was a ftretch, but not beyond the bounds of equity: the cautioner himfelf, as creditor for relief, could have redeemed this apprifing in terms of the ftatute; and it was thought, that every privilege competent to a debtor ought to be extended to his creditors, in order to make their claims effectual. *5to*, The privilege is extended to redeem an apprifing during the legal, though the ftatute mentions only an expired apprifing. And, *laftly*, Though the privilege of redemption is limited to ten years after the purchafe made



made by the heir-apparent, it was judged, that the ten years begin not to run but from the time that the purchase is known to the creditors. These decisions all of them are to be found in the Dictionary, vol. i. p. 359.

It is chiefly to statutes of this kind that the following doctrine is applicable. “Non  
 “ possunt omnes articuli singillatim aut  
 “ legibus aut senatusconsultis comprehen-  
 “ di : sed cum in aliqua causa sententia  
 “ eorum manifesta est, is, qui jurisdictioni  
 “ præest, ad similia procedere, atque ita  
 “ jus dicere debet. Nam, ut ait Pedius,  
 “ quoties lege aliquid, unum vel alterum  
 “ introductum est, bona occasio est, cætera,  
 “ quæ tendunt ad eandem utilitatem, vel  
 “ interpretatione vel certe *jurisdictione*, sup-  
 “ pleri \*.”

The next branch is of means that are incomplete in every respect, where the very thing in view of the legislature is but imperfectly remedied. Of this take the following illustrious example, which at the same time furnishes an opportunity to explain the nature and effect of an adjudication after its legal is expired.

\* l. 12. & 13. De legibus.

An adjudication during the legal is a *pignus prætorium* : and expiry of the legal is held to transfer the property from the debtor to the creditor; precisely as in a wadset or mortgage, where the redemption is limited within a day certain. Yet the rule which, with relation to a wadset, affords an equity of redemption after the stipulated term of redemption is past \*, has never been extended, directly at least, to relieve against an expired legal. This subject therefore is curious, and merits attention.

In a pointing of moveables, the debtor has not an equity of redemption, because the moveables are transferred to the creditor at a just value. The same being originally the case of an apprising of land, the legal reversion of seven years introduced by the act 36. parl. 1469, was in reality a privilege bestowed upon the debtor, without any foundation in equity; and therefore equity could not support an extension of the reversion one hour beyond the time granted by the statute. But the nature of an apprising was totally reversed, by an oppressive and dishonest practice of

\* Pag. 70.

attaching

attaching land for payment of debt, without preserving any equality between the debt and the land; great portions of land being frequently carried off for payment of inconsiderable sums. An apprising, as originally constituted, was a judicial sale for a just price: but an execution, by which land at random is attached for payment of debt without any estimation of value, ought to have been reprobated as flying in the face of law. By what means it happened that creditors were indulged to act so unjustly, I cannot say; but so it is, that such apprisings were supported even against the clearest principles of common law. An apprising so irregular cannot indeed be held as a judicial sale for a just price: the utmost indulgence that could be given it, was to hold it to be a security for payment of debt. Accordingly the act 6. parl. 1621, considers it in that light, enacting, "That apprisers shall be  
" accountable for their intromissions with-  
" in the legal, first in extinction of the in-  
" terest, and thereafter of the capital;" which, in effect, is declaring the property to remain with the debtor, as no man is bound to account for rents that are his  
I own.

own. And it is considered in the same light by the act 62. parl. 1661, "ranking *pari passu* with the first effectual apprising, all other apprisings led within year and day of it:" creditors real or personal may be ranked upon a common subject *pari passu*, or in what order the legislature thinks proper; but such ranking evidently implies that the property belongs to the debtor (a).

An apprising then, or, instead of it, an adjudication, has, during the legal, sunk down to be a *pignus pratorium*, or a judicial security for debt; and the remaining question is, Whether it be converted into a title of property upon expiry of the legal. The act 1621 above mentioned makes apprisers accountable for their in-

(a) Stair declares positively for this doctrine.

"An apprising is truly a *pignus pratorium*: the

"debtor is not denuded, but his investment stands.

"And if the apprising be satisfied within the legal,

"it is extinguished, and the debtor need not be re-

"invested. Therefore he may receive vassals du-

"ring the legal; and if he die during the legal, his

"apparent heir, intromitting with the mails and

"duties, doth behave himself as heir." Book 2.

tit. 10. § 1.



fromission within the legal; and if they be not accountable after, ought it not to be inferred, that they must be held to be proprietors? It may indeed be clearly inferred from the act, that they are not accountable after the legal is expired; but it follows not that the property must be held to be in them: I instance a proper wadsetter, who is not proprietor of the subject, and yet is not liable to account. I say farther, that a court of equity, though it has no power to overturn express law, is not bound by any inference drawn from a statute, however clear, except as far as that inference is supported by the rules of justice. And in that view we proceed to inquire, what are the rules of justice with respect to an apprising or an adjudication after expiration of the legal.

According to the original form of an apprising, requiring a strict equality between the debt and the value of the land, it was rational and just, that the property of the land should instantly be transferred to the creditor in satisfaction of the debt; but it could no longer be rational or just to transfer the property, after it became customary

stomary to attach land at random without regarding its extent. The debtor's whole land-estate was apprifed, and is now adjudged by every fingle creditor, however small his debt may be; and therefore to transfer to an apprifiser or adjudger the property of the land *ipfo facto*, upon the debtor's failure to make payment within the legal, would be a penal irritancy of the severest kind. On the other hand, this supposed *ipfo facto* transference of the property is penal upon the creditor where the land adjudged by him happens to be less in value than his debt: in that case, it would be glaring injustice to force the land upon him in payment of his debt. Nay more, it is repugnant to first principles, that a man should be compelled to take land for his debt, however valuable the land may be: it may be his choice to continue possession as creditor, after the legal as well as before; and this must be understood his choice, if he do not signify the contrary. To relieve the creditor as well as the debtor from the foregoing hardships, equity steers a middle course. It admits not an *ipfo facto* transference of the property; upon expiry of the legal; but

only gives the creditor an option, either to continue in his former situation, or to take the land for his debt; which last must be declared in a process, intitled *a declarator of expiry of the legal*. This removes all hardship: land is not imposed upon the creditor against his will: the debtor, on the other hand, has an opportunity to purge his failure, by making payment: and if he suffer a decree to pass without offering payment, it is just that the property be transferred to the creditor in satisfaction of the debt; for judicial proceedings ought not for ever to be kept in suspense. Thus, the law is so constructed as to make the property transferable only, and not to be transferred but by the intervention of a declarator. The declarator here, serves the same double purpose that it serves in the *lex commissoria in pignoribus*: it is a declaration of the creditor's will to accept the land for his money; and it relieves the debtor from a penal irritancy, by admitting him to purge at any time before the declaratory decree pass.

We proceed to examine how far the practice of the court of session concerning apprisings and adjudications, is conformable

able to the principles above laid down. And I must prepare my reader beforehand to expect here the same wavering and fluctuation between common law and equity, that in the course of this work is discovered in many other instances. I observe, in the first place, That though the court, adhering to common law, has not hitherto sustained to the debtor an equity of redemption after expiry of the legal, yet that the same thing in effect is done indirectly, through the influence of equity. Some pretext or other of informality is always embraced to open an expired legal, in order to afford the debtor an opportunity to redeem his land by payment of the debt. And this has been carried so far, as to open the legal to the effect solely of intitling the debtor to make payment, holding the legal as expired with respect to other effects, such as that of relieving the creditor from accounting for the rents levied by him, unless during the ten years that the legal is current by statute\*.

In another particular, our practice appears to deviate far from just principles.

\* Forbes, February 2. 1711, Guthrie contra Gordon.

With



With respect to the adjudger, it is justly held; that the debt due to him cannot be extinguished without his consent; whence it necessarily follows, that, even after the legal is expired, he must have an option, to adhere to his debt, or to take the land instead of it. This is established in our present practice: and what man is so blind as not to perceive what necessarily follows? An adjudger, upon whose will it depends to continue creditor, or to take himself to the land, cannot be proprietor of that land: before the property can be transferred to him, he must interpose his will, which is done by a declarator; and so far our practice proceeds upon just principles. But whether what is held with respect to the debtor be consistent with that practice, we next inquire. It is held, that the debtor's power of redemption is confined within the legal; that, by expiry of the legal, he is forfeited *ipso facto* of his property; and consequently that he has no power to redeem, nor to purge his failure of payment. Here we find a direct inconsistency in our practice: with respect to the creditor, the property is not his, till he obtain a declarator of expiry of the legal: with respect to

to the debtor, the property without a declarator is lost to him *ipso facto*, by expiry of the legal. Can any man say who is proprietor in the interim? These notions cannot be reconciled; but the cause of them may be accounted for. In our practice, there is a strong bias to creditors in opposition to their debtors. This bias hath bestow'd on an appriſer the equitable privilege of an option between the debt and the land upon which he is ſecured: the rigor, on the other hand, with which debtors are treated, has denied them the equitable privilege of purging an irritant claufe at any time before the door be ſhut againſt them by a declaratory decree.

## S E C T. III.

*Where the means enacted reach unwarily beyond the end purpoſed by the legiſlature.*

BY the common law of England, eccleſiaſtics were at liberty to grant leaſes without limitation of time. As this liberty might be exerciſed greatly to the hurt  
of

of their successors in office, the statute 13<sup>o</sup> Eliz. cap. 10. was made, prohibiting ecclesiastics from granting a lease for a longer time than twenty-one years, or three lives. In the construction of this statute, it is held, that a lease during the life of the grantor is good were he to live a century; for not being within the mischief, it is not within the remedy.

The act 6. parl. 1672, requires, "That all executions of summons shall bear expressly the names and designations of the pursuers and defenders." This regulation was necessary in order to connect the execution with the summons. For as at that period it was common to write an execution upon a paper apart, bearing a reference in general to the summons, in the following manner, "That the parties within expressed were lawfully cited," &c. the execution of one summons might be applied to any other, so as to become legal evidence of a citation that was never given. But as there can be no opportunity for this abuse where an execution is written upon the back of the summons, it belongs to a court of equity, with respect to a case where the statutory remedy is unnecessary,

necessary, to relieve so far from the enacting clause; which is done by declaring, that it is not necessary to name the pursuers and defenders where the execution is written on the back of the summons\*.

By the 34th and 35th Henry VIII. cap. 5. § 14. it is declared, That a will or testament made of any manors, lands, &c. by a feme covert, shall not be effectual in law. This could not be intended to render ineffectual a will made by a woman whose husband is banished for life by act of parliament. And accordingly such will was sustained †.

The statutes introducing the positive and negative prescriptions, have for their object public utility; and the supplying defects in these statutes rests upon the same principle; a subject that belongs to the next book, which contains the proceedings of a court of equity acting upon the principle of utility. But to mitigate these statutes with respect to articles that happen to be oppressive and unjust, is a branch of

\* Feb. 20. 1755, Sir William Dunbar contra John Macleod younger of Macleod.

† 2 Vernon 104.



the present subject; and to examples of that kind I proceed. Common law, which limits not actions within any time, affords great opportunity for unjust claims, which, however ill founded originally, are brought so late as to be secure against all detection. It is not wrong in common law to sustain an old claim, for a claim may be very old and yet very just: but to sustain claims without any limitation of time, gives great scope to fraud and forgery; and for that reason public utility required a limitation. Upon that principle the statutes 1469 and 1474 were made, denying action upon debts and other claims beyond forty years. A court of common law proceeding upon these statutes, cannot sustain action after forty years, even where a claim is evidently well founded, as where it is proved to be so by referring it to the oath of the defendant. In this case, the means enacted go evidently beyond the end purposed by the legislature; which intended only to secure against suspicious and ill-founded claims, not to cut off any just debt; and in this view nothing farther could be intended than to introduce a presumption against every claim brought after forty years;

years; reserving to the pursuer to bring positive evidence of its being a subsisting claim, and justly due. Yet the court of session, acting as a court of common law, did in one instance refuse to sustain action after the forty years, though the debt was offered to be proved by the oath of the defendant \*. In another point they act properly as a court of equity. Persons under age are relieved from the effect of these statutes, for an extreme good reason, That no presumption can lie against a creditor while under age, for delaying to bring his action.

The same construction in equity is given to the English act of limitation concerning personal actions: it is held, That a bare acknowledgement of the debt is sufficient to bar the limitation †; importing, that the legislature intended not to extinguish a just debt, but only to introduce a presumption of payment. But with this doctrine I cannot reconcile what seems to be established in the English courts of e-

\* Fountainhall, Dec. 7. 1703, Napier contra Campbell.

† Abridg. of the law, vol. 3. p. 517.

quity, " That if a man by will or deed  
" subject his land to the payment of his  
" debts, debts barred by the statute of li-  
" mitations shall be paid; for they are  
" debts in equity, and the statute hath  
" not extinguished the obligation, though  
" it hath taken away the remedy\*," This  
differs widely from the equitable construc-  
tion of the statute; for if its intendment  
be to presume such debts paid, they can-  
not even in equity be considered as debts,  
unless the statutory presumption be remo-  
ved by contrary evidence. The following  
case proceeds upon the same misapprehen-  
sion of the statute: " It hath also been  
" ruled in equity, that if a man has a debt  
" due to him by note, or a book-debt,  
" and has made no demand of it for six  
" years, so that he is barred by the statute  
" of limitations; yet if the debtor or his  
" executor, after the six years, puts out an  
" advertisement in the Gazette, or any o-  
" ther news-paper, that all persons who  
" have any debts owing to them may ap-  
" ply to such a place, and that they shall  
" be paid; this, though general, (and

\* Abridg. of the law, vol. 3. p. 518.

" therefore

“ therefore might be intended of legal  
“ subsisting debts only), yet amounts to  
“ such an acknowledgement of that debt  
“ which was barred, as will revive the  
“ right, and bring it out of the statute a-  
“ gain \*.”

To the case first mentioned of referring a debt to the defendant's oath, a maxim in the law of England is obviously applicable, “ That a case out of the mischief, is out of the meaning of the law, though it be within the letter.” A claim, of whatever age, referred to the defendant's oath, is plainly out of the mischief intended to be remedied by the foregoing statutes; and therefore ought not to be regulated by the words, which in this case go beyond the end purposed. Coke † illustrates this maxim by the following example. The common law of England suffered goods taken by distress to be driven where the creditor pleased; which was mischievous, because the tenant, who must give his cattle sustenance, could have no knowledge where they were. This mischief was remedied by statute 3. Edward I. cap 16.

\* Abridg. of the law, vol. 3. p. 518.

† 2 Instit. 106.

enacting,



enacting, "That goods taken by distress shall not be carried out of the shire where they are taken." Yet, says our author, if the tenancy be in one county and the manor in another, the lord may drive the distress to his manor, contrary to the words of the statute; for the tenant, by doing of suit and service to the manor, is presumed to know what is done there.

The act 83. parl. 1579, introducing a triennial prescription of shop-accounts, &c. is directed to the judges, enacting, "That they shall not sustain action after three years," without making any distinction between natives and foreigners. Nor is there reason for making a distinction; because every claimant, native or foreigner, must bring his action for payment in the country where the debtor resides; and for that reason both equally ought to guard against the prescription of that country. When such is the law of prescription in general, and of the act 1579 in particular, I cannot avoid condemning the following decision. "In a pursuit for an account of drugs, furnished from time to time by a London druggist to an Edinburgh  
" Edinburgh

“dinburgh apothecary, the court repelled  
“the defence of the triennial prescription,  
“and decreed, That the act of limitation  
“in England, being the *locus contractus*,  
“must be the rule \*.” There is here another error beside that above mentioned. The English statute of limitation has no authority with us, otherwise than as inferring a presumption of payment from the delay of bringing an action within six years; and this presumption cannot arise where the debtor is abroad, either in Scotland or beyond seas.

If the prescription of the country where the debtor dwells be the rule which every creditor foreign or domestic ought to have in view, it follows necessarily, that a defendant, to take advantage of that prescription, must be able to specify his residence there, during the whole course of the prescription. While the debtor resides in England, for example, or in Holland, the creditor has no reason to be upon his guard against the Scotch triennial prescription: and supposing the action to be brought the next day after the debtor settles

\* November 1731, *Fulks contra Aikenhead*.

in Scotland, it would be absurd that the creditor should be cut out by the triennial prescription. I illustrate this doctrine by a plain case. A shop-keeper in London furnishes goods to a man who has his residence there. The creditor, trusting to the English statute of limitation, reckons himself secure if he bring his action within six years; but is forc'd to bring his action in Scotland, to which the debtor retires after three years. It would in this case be unjust, to sustain the Scotch triennial prescription as a bar to the action; in which view, the means enacted in the statute 1579 are unwarily too extensive, forbidding action after three years, without limiting the defence to the case where the defendant has been all that time in Scotland.

Equity is also applied to mitigate the rigor of statute-law with respect to evidence. By the English statute of frauds and perjuries \*, it is enacted, "That all leases, estates, interests of freehold or terms of years, made or created by parole and not put in writing, shall have the force and effect of leases or estates at will only." In the construction of this statute the following point was resolved, That if there

\* 29. Charles II. cap. 3.

be a parole-agreement for the purchase of land, and that in a bill brought for a specific performance, the substance of the agreement be set forth in the bill, and confessed in the answer, the court will decree a specific performance; because in this case there is no danger of perjury, which was the only thing the statute intended to prevent \*. Again, whatever evidence may be required by law, yet it would be unjust to suffer any man to take advantage of the defect of evidence, when the defect is occasioned by his own fraud. There are accordingly many instances in the English law-books, where a parole-agreement intended to be put into writing, but prevented by fraud, has been decreed in equity, notwithstanding the statute of frauds and perjuries. Thus upon a marriage-treaty, instructions given by the husband to draw a settlement, are by him privately countermanded: after which he draws in the woman, upon the faith of the settlement, to marry him. The parole-agreement will be decreed in equity †.

\* Abridg. cases in equity, ch. 4. sect. B. § 3.

† Ibid. § 4.



Statutory irritancies in an entail are handled book 1. part 1. chap. 4. sect. 1. art. 3.

Whether can a statutory penalty be mitigated by a court of equity. See below, chap. 8.

## C H A P. VI.

Powers of a court of equity to remedy what is imperfect in common law with respect to matters between debtor and creditor.

**W**ith respect to this subject, we find daily instances of oppression, sometimes by the creditor, sometimes by the debtor, authorised by one or other general rule of common law, which happens to be unjust when applied to some singular case out of the reason of the rule. In such cases, it is the duty of a court of equity, to interpose and to relieve from the oppression. To trust this power with some court,

court, is evidently a matter of necessity; for otherwise wrong would be authorised without remedy. - Such oppression appears in different shapes and in different circumstances, which I shall endeavour to arrange properly; beginning with the oppression a creditor may commit under protection of common law, and then proceeding to what may be committed by a debtor.

## S E C T.      I.

*Injustice of common law with respect to compensation.*

**B**Y the common law of this land, when a debtor is sued for payment, it will afford no defence that the plaintiff owes him an equivalent sum. This sum he may demand in a separate action; but in the mean time, if he make not payment of the sum demanded, a decree issues against him, to be followed with execution. Now this is rigorous, or rather unjust. For, with respect to the plaintiff, unless he mean to oppress, he cannot wish better payment

than to be discharged of the debt he owes the defendant. And, with respect to the defendant, it is gross injustice to subject him to execution for failing to pay a debt, when possibly the only means he has for payment is that very sum the plaintiff detains from him. To that act of injustice, however, the common law lends its authority, by a general rule, empowering every creditor to proceed to execution when his debtor fails to make payment. But that rule, however just in the main, was never intended to take place in the present case; and therefore a court of equity remedies an act of injustice occasioned by a too extensive application of the rule beyond the reason and intention of the law. The remedy is, to order an account in place of payment, and the one debt to be hit off against the other. This is termed the *privilege of compensation*, which furnishes a good defence against payment. Compensation accordingly was in old Rome sustained before the Prætor; and in England has long been received in courts of equity. In Scotland indeed it has the authority of a statute\*; which it seems was

\* Act 143. parl. 1592.

thought

thought necessary, because at that period the court of session was probably not understood to be a court of equity \*. But perhaps there was a further view, namely, to introduce compensation as a defence into courts of common law; and with that precise view did compensation lately obtain the authority of a statute in England †: the defence of compensation was always admitted in the court of chancery; but by authority of the statute, it is now also admitted in courts of common law.

In applying, however, the foregoing statute, the powers of a court of equity are more extensive, than of a court of common law. A court of common law is tied to the letter of the statute, and has no privilege to inquire into its motive. But the court of session, as a court of equity, may supply its defects and correct its excesses. Yet I know not by what misapprehension, the court of session, with regard to this statute, hath always been considered as a court of common law, and not as a court of equity; a misapprehension the less excusable, considering the subject of

\* See the Introduction.

† 2. Geo. II. cap. 22. § 11.



the statute, a matter of equity, which the court itself could have introduced had the statute never been made. I shall make this reflection plain, by entering into particulars. The statute authorises compensation to be pleaded in the original process only, by way of exception, and gives no authority to plead it whether in the reduction or suspension of a decree. The words are, "That a liquid debt be admitted by way of exception before decret by all judges, but not in a suspension nor reduction of the decret." This limitation is proper in two views. The first is, that the omitting or forbearing to plead compensation in the original process is not a good objection against the decree. The other view is, that it would afford too great scope for litigiousness, were defendants indulged to reserve their articles of compensation as a ground for suspension or reduction. Attending to these views, a decree purely in absence ought not to bar compensation; because it is often pronounced when the party hath not an opportunity to appear. For that reason, a party who is restored to his defences in a suspension, upon shewing that his absence

was

was not contumacious, ought to be at liberty to plead every defence, whether in equity or at common law. And yet our judges constantly reject compensation when pleaded in a suspension of a decree in absence, though that case comes not under the reason and motive of the statute. The statute, in my apprehension, admits of still greater latitude; which is, that after a decree *in foro* is suspended for any good reason, compensation may be received in discussing the suspension; for the statute goes no farther but to prohibit a decree to be suspended merely upon compensation. Nor can it have any bad effect to admit compensation when a cause is brought under review by suspension because of error committed in the original process: on the contrary, it is beneficial to both by preventing a new law-suit.

If the decisions of the court of session upon the different articles of this statute show a slavish dependence on the common law; the decisions which regulate cases of compensation not provided for by the statute breathe a freer spirit, being governed by true principles of equity. The first case that presents itself, is, where one only  
of

of the two concurring debts bears interest. What shall be the effect of compensation in that case? Shall the principal and interest be brought down to the time of pleading compensation, and be set off at that period against the other debt which bears not interest? Or shall the account be instituted as at the time of the concurrence, as if from that period interest were no longer due? Equity evidently concludes for the latter; for it considers, that each had the use of the other's money; and that it is not just the one should have a claim for interest while the other has none: interest is a premium for the use of money, and my creditor in effect gets that premium by having from me the use of an equivalent sum. And accordingly, it is the constant practice of the court, to stay the course of interest from the time the two debts concurred. But as it would be unjust to make a debtor pay interest for money he must retain in his hand ready to answer a demand, therefore in such a case compensation is excluded. Example. A tacksmen lends a considerable sum to his landlord, agreeing in the bond to suspend the payment during the currency of the tack, but

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stipulating to himself a power to retain the interest annually out of the tack-duty. The tackfman makes punctual payment of the surplus tack-duties, as often as demanded: but, by some disorder in the landlord's affairs, a considerable arrear is allowed to remain in the hands of the tackfman. The landlord pleading to make the tack-duties in arrear operate *retro* against the bonded debt, so as to extinguish some part of the principal annually, the *retro* operation was not admitted: because, in terms of the contract, the tackfman was bound to keep in his hand the surplus tack-duties ready to be paid on demand; and for that reason it would be unjust to make him pay interest for this sum; or, which comes to the same, it would be unjust to make it operate *retro*, by applying it annually in extinction of the bonded debt bearing interest\*.

In applying compensation, both claims must be pure; for it is not equitable to delay paying a debt of which the term is past, upon pretext of a counter-claim that cannot at present be demanded, or that

\* July 21. 1756, Campbell contra Carruthers.



is uncertain as to its extent. But what if the pursuer be bankrupt, or be *vergens ad inopiam*? The common law authorises a bankrupt to insist for payment equally with a person solvent: but it is not just to oblige me to pay what I owe to a bankrupt, and to leave me without remedy as to what he owes me. This therefore is a proper case for the interposition of equity. It cannot authorise compensation in circumstances that afford not place for it; but it can prevent the mischief in the most natural manner, by obliging the bankrupt to find security to make good the counterclaim when it shall become due; and this is the constant practice of the court of session.

Compensation would be but an imperfect remedy against the oppression of the common law, if it could not be applied otherwise than by exception. The statute, it is true, extends the remedy no farther; but the court of session, upon a principle of equity, affords a remedy where the statute is silent. Supposing two mutual debts, of which the one only bears interest, the creditor in the barren debt demands his money; which the debtor pays without pleading

pleading compensation, and then demands the debt due to himself with the interest. Or let it be supposed, that payment of the barren debt is offered, which the creditor must accept, however sensible of the hardship. In these cases there is no opportunity to apply the equitable rule, That both sums should bear interest, or neither. Therefore, to give opportunity for applying that rule, a process of mutual extinction of the two debts ought to be sustained to the creditor whose sum is barren; to have effect *retro* from the time of concurrence: and this process accordingly is always sustained in the court of session.

We next take under consideration the case of an assignee. And the first question is, Whether the process of mutual extinction now mentioned be competent against an assignee. To prevent mistakes, let it be understood, that an assignment intimated is, in our present practice, a proper *cessio in jure*, transferring the claim *funditus* from the assignor or cedent to the assignee. This being taken for granted, it follows, that compensation cannot be pleaded against an assignee: for though one of the claims is now transferred to him, that cir-

cumstance subjects him not to the counter-claim; and therefore there is no mutual concourse of debts between the parties, upon which to found a compensation.

Let us suppose, that the claim bearing interest is that which is assigned. This claim, principal and interest, must be paid to the assignee, because he is not subjected to the counter-claim. Must then the assignee's debtor, after paying the principal and interest, be satisfied to demand from the cedent the sum due to himself which bears not interest? At that rate, the creditor whose claim bears interest, will always take care by an assignment to prevent compensation. This hardship is a sufficient ground for the interposition of equity. If the cedent hath procured an undue advantage to himself, by making a sum bear interest in the name of an assignee, which would not bear interest in his own name; the debtor ought not to suffer; and the proper reparation is to oblige him to pay interest *ex æquitate*, though the claim at common law bears none.

But if the debt assigned be that which bears not interest, a total separation is thereby

thereby made between the two debts. And what after this can prevent the counter-claim with its interest from being made effectual against the cedent? No objection in equity can arise to him, seeing, with his eyes open, he deprived himself of the opportunity of compensation, the only mean he had to avoid paying interest upon the counter-claim.

In handling compensation as directed by equity, I have hitherto considered what the law ought to be, and have carefully avoided the intricacies of our practice, which in several particulars appears erroneous. To complete the subject, I must take a survey of that practice. By our old law, derived from that of the Romans, and from England, a creditor could not assign his claim; all he could do was to grant a procuratory *in rem suam*; which did not transfer the *jus crediti* to the assignee, but only intitled him *procuratorio nomine* to demand payment. From the nature of this title it was thought, that compensation might be pleaded against the assignee as well as against the cedent: and indeed, considering the title singly, the opinion is right; because the pleading compensation against



a procurator, is in effect pleading it against the cedent or creditor himself. The opinion however is erroneous; and the error arises from overlooking the capital circumstance, which is the equitable right that the assignee, though considered as a procurator only, hath to the claim assigned, by having paid a price for it. Equity will never subject such a procurator or assignee to the cedent's debts, whether in the way of payment or compensation. And as for the statute, it affords not any pretext for sustaining compensation against such an assignee; being made to support compensation against the rigor of common law; but to support it only as far as just. It could not therefore be the intention of the legislature, in defiance of justice, to make compensation effectual against an assignee who pays value. Nor must it pass unobserved, that, as our law stands at present, this iniquitous effect given to compensation is still more absurd, if possible, than it was formerly. In our later practice an assignment has changed its nature, and is converted into a proper *cessio in jure*, divesting the cedent *funditus*, and vesting the assignee. Whence it follows, that, af-

ter an assignment is intimated, compensation is barred from the very nature of the assignee's right, even laying aside the objection upon the head of equity. But we begun with sustaining compensation against an assignee for a valuable consideration, in quality of a procurator; not adverting, that though his title did not protect him from compensation, his right as purchaser ought to have had that effect: and by the force of custom we have adhered to the same erroneous practice, though now the title of an assignee protects him from compensation, as well as the nature of his right when he pays value for it.

## S E C T. II.

*Injustice of common law with respect to indefinite payment.*

**N**Ext of oppression or wrong that may be committed by a debtor, under protection of common law.

Every man who has the administration of his own affairs, may pay his debts in what

what order he pleases, where his creditors interpose not by legal execution. Nor will it make a difference, that several debts are due by him to the same creditor; for the rule of law is, That if full payment be offered of any particular debt, the creditor is bound to accept, and to give a discharge.

But now supposing a sum to be delivered by the debtor to the creditor as payment, but without applying it to any one debt in particular, termed *indefinite payment*, the question is, By what rule shall the application be made when the parties afterward come to state an account. If the debts be all of the same kind, it is of no importance to which of them the sum be applied: otherwise, if the debts be of different kinds, one for example bearing interest, one barren. The rule in the Roman law is, *Quod electio est debitoris*; a rule founded on the principles of common law. The sum delivered to the creditor is in his hand for behoof of the debtor, and therefore it belongs to the debtor to make the application. But though this is the rule of common law, it is not the rule of justice: if the debtor make an undue application

application, equity will interpose to relieve the creditor from the hardship. A debtor, it is true, delivering a sum to his creditor, may direct the application of it as he thinks proper : he may deliver it as payment of a debt bearing interest, when he is due to the same creditor a debt bearing none ; yet a remedy in this case is beyond the reach of equity. But where the money is already in the hand of the creditor indefinitely, the debtor has no longer the same arbitrary power of making the application : equity interposing, will direct the application. Thus, indefinite payment comes under the power of a court of equity.

In order to ascertain the equitable rules for applying an indefinite payment, a few preliminary considerations may be of use. A loan of money is a mutual contract equally for the benefit of the lender and borrower : the debtor has the use of the money he borrows, and for it pays to the creditor a yearly premium. With respect therefore to a sum bearing interest, the debtor is not bound, either in strict law or in equity, to pay the capital until the creditor make a demand. A debt



not bearing interest is in a very different condition : the debtor has the whole benefit, and the creditor is deprived of the use of his money without a valuable consideration ; which binds the debtor, in good conscience, either to pay the sum, or to pay interest. Though this be a matter of duty, it cannot however be enforced by a court of equity in all cases ; for it may be the creditor's intention to assist the debtor with the use of money without interest : but upon the first legal expression of the creditor's will to have his money, a court of equity ought to decree interest.

Another preliminary is, that where a cautioner accedes to a bond of borrowed money, the debtor is in conscience bound to pay the sum at the term covenanted, in order to relieve his cautioner, who has no benefit by the transaction. The case is different where the cautioner shews a willingness to continue his credit.

Entering now into particulars, the first case I shall mention is, where two debts are due by the same debtor to the same creditor, one of which only bears interest. An indefinite payment ought undoubtedly  
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to be applied to the debt not bearing interest; because this debt ought in common justice to be first paid, and there is nothing to oblige the debtor to pay the other till it be demanded. A man of candor will make the application in this manner; and were there occasion for a presumption, it will be presumed of every debtor that he intended such application. But the judge has no occasion for a presumption: his authority for making the application is derived from a principle of justice. The same principle directs, that where both debts bear interest, the indefinite payment ought first to be applied for extinguishing what is due of interest; and next for extinguishing one or other capital indifferently, or for extinguishing both in proportion (a).

The second case shall be of two debts bearing interest; one of which is secured by infestment or inhibition. It is equal to the debtor which of the debts be first paid:

(a) The rule here laid down seems to be unknown in England. Sometimes it is found that *electio est debitoris*, and sometimes that it is *creditoris*. *Abridg. cases in equity, cap. 22. sect. D. § 1. & 2.*

and therefore, the indefinite payment ought to be applied to the debt for which there is the slenderest security; because such application is for the interest of the creditor. Take another case of the same kind. A tenant in tail owes two debts to the same creditor; one of his own contracting, and one as representing the entail. Every indefinite payment he makes ought to be ascribed to his proper debt, for payment of which there is no fund but the rents during his life. This, it is true, is against the interest of the substitutes; but their interest cannot be regarded in the application of rents which belong not to them but to the tenant in tail: and next, as they are *certantes de lucro captando*, their interest cannot weigh against that of a creditor who is *certans de damno evitando*.

Third case. A debtor obtains an ease, upon condition of paying at a day certain the transacted sum bearing interest: he is also bound to the same creditor in a separate debt not bearing interest. The question is, To which of these debts ought an indefinite payment to be applied? It is the interest of the debtor that it be applied

plied to the transacted sum : it is the interest of the creditor that it be applied to the separate debt not bearing interest. The judge will not prefer the interest of either, but make the application in the most equitable manner, regarding the interest of both : he will therefore, in the first place, consider which of the two has the greatest interest in the application ; and he will so apply the sum as to produce the greatest effect. This consideration will lead him to make the application to the transacted sum ; for if the transaction be in any degree lucrative, the debtor will lose more by its becoming ineffectual, than the creditor will by wanting the interim use of the money due to him without interest. But then, the benefit ought not to lie all on one side ; and therefore equity rules, that the debtor, who gets the whole benefit of the application, ought to pay interest for the separate sum ; which brings matters to a perfect equality between them. For the same reason, if the application be made to the debt not bearing interest, the transaction ought to be made effectual, notwithstanding the term appointed for paying the transacted sum be elapsed.

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Fourth case. Suppose the one debt is secured by adjudication the legal of which is near expiring, and the other is a debt not bearing interest. And, to adjust the case to the present subject, we shall also suppose, that the legal of an adjudication expires *ipso facto* without necessity of a declarator. An indefinite payment here ought to be applied for extinguishing the adjudication. And, for the reason given in the preceding case, the separate debt ought to bear interest from the time of the indefinite payment.

Fifth case. An heir of entail owes two debts to the same creditor; the one a debt contracted by the entailer not bearing interest, the other a debt bearing interest contracted by the heir, which may found a declarator of forfeiture against him. An indefinite payment ought to be applied to the first-mentioned debt, because it bears not interest: for with regard to the heir's hazard of forfeiture, the forfeiture, which cannot be made effectual but by a process of declarator, may be prevented by paying the debt. And the difficulty of procuring money for that purpose, is an event

too

too distant and too uncertain to be regarded in forming a rule of equity.

Sixth case. Neither of the debts bears interest; and one of them is guarded by a penal irritancy, feu-duties for example, due more than two years. In this case, the feu-duties ought to be extinguished by the indefinite payment; because such application relieves the debtor from a declarator of irritancy, and is indifferent to the creditor as both debts are barren. Nor will it be regarded, that the creditor is cut out of the hope he had of acquiring the subject by the declarator of irritancy; because in equity the rule holds without exception, *Quod potior debet esse conditio ejus qui certat de damno evitando, quam ejus qui certat de lucro captando.*

Seventh case. If there be a cautioner in one of the debts, and neither debt bear interest, the indefinite payment ought undoubtedly to be applied for relieving the cautioner. Gratitude demands this from the principal debtor, for whose service solely the cautioner gave his credit. It may be more the interest of the creditor to have the application made to the other debt, which is not so well secured: but the debtor's

debtor's connection with his cautioner is more intimate than with his creditor; and equity respects the more intimate connection as the foundation of a stronger duty.

Eighth case. Of the two debts, the one is barren, the other bears interest, and is secured by a cautioner. The indefinite payment ought to be applied to the debt that bears not interest. The delaying payment of such a debt, where the creditor gets nothing for the use of his money, is a positive act of injustice. On the other hand, there is no positive damage to the cautioner, by delaying payment of the debt for which he stands engaged. There is, it is true, a risk; but seeing the cautioner makes no legal demand to be relieved, it may be presumed that he willingly submits to the risk.

Ninth case. One of the debts is a transacted sum that must be paid at a day certain, otherwise the transaction to be void: or it is a sum which must be paid without delay, to prevent an irritancy from taking place. The other is a bonded debt with a cautioner, bearing interest. The indefinite payment must be applied to  
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make the transaction effectual, or to prevent the irritancy. For, as in the former case, the interest of the creditor, being the more substantial, is preferred before that of the cautioner; so, in the present case, the interest of the debtor is for the same reason preferred before that of the cautioner.

Tenth case. An indefinite payment made after insolvency to a creditor in two debts, the one with, the other without a cautioner, ought to be applied proportionally to both debts, whatever the nature or circumstances of the debts may be: for here the creditor and cautioner being equally *certantes de damno evitando*, ought to bear the loss equally. It is true, the debtor is more bound to the cautioner who lent his credit for the debtor's benefit, than to the creditor who lent his money for his own benefit; but circumstances of this nature cannot weigh against the more substantial interest of preventing loss and damage.



## S E C T.      III.

*Injustice of common law with respect to rent  
levied indefinitely.*

**B**Y the common law of this land, a creditor introduced into possession upon a wadset, or upon an assignment to rents, must apply the rent he levies toward payment of the debt which is the title of his possession; because for that very purpose is the right granted. Rent levied by execution, upon an adjudication for example, must for the same reason be applied to the debt upon which the execution proceeds. Rent thus levied, whether by consent or by execution, cannot be applied by the creditor to any other debt however unexceptionable.

But this rule of common law may in some cases be rigorous and materially unjust; to the debtor sometimes, and sometimes to the creditor. If a creditor in possession by virtue of a mortgage or improper wadset, purchase or succeed to an adjudication of the same land, it is undoubtedly

edly the debtor's interest that the rents be applied to the adjudication, in order to prevent expiry of the legal, not to the wadset which contains no irritancy nor forfeiture upon failure of payment. But if the creditor purchase or succeed to an investment of annualrent, upon which a great sum of interest happens to be due, it is beneficial to him that the rents be ascribed for extinction of that interest, rather than for extinction of the wadsetsum which bears interest. These applications cannot be made, either of them, upon the principles of common law; and yet material justice requires such application, which is fair and equitable weighing all circumstances. No man of candour in possession of his debtor's land by a mortgage or improper wadset, but must be ashamed to apply the rents he levies to the wadset, when he has an adjudication, the legal of which is ready to expire. And no debtor of candour but must be ashamed to extinguish a debt bearing interest, rather than a debt equally unexceptionable that is barren.

Equity therefore steps in to correct the oppression of common law in such cases;

and it is lucky that this can be done by rules, without hazard of making judges arbitrary. These rules are delineated in the section immediately foregoing; and they all resolve into a general principle, which is, "That the judge ought to apply  
 " the rents so as to be most equal with re-  
 " spect to both parties, and so as to pre-  
 " vent rigorous and hard consequences on  
 " either side."

But this remedy against the rigour of common law, ought not to be confined to real debts that intitle the creditor to possess. In particular cases, it may be more beneficial to the debtor or to the creditor, without hurting either, to apply the rents for payment even of a personal debt, than for payment of the debt that is the title of possession. What if the personal debt be a bulky sum, restricted to a lesser sum upon condition of payment being made at a day certain? It is the debtor's interest that the rents be applied to this debt in the first place; as, on the other hand, it is the creditor's interest that they be applied to a personal debt which is barren. A court of equity, disregarding the rigid principles of common law, and consider-  
 ing

ing matters in the view of material justice, reasons after the following manner. A personal creditor has not access to the rents of his debtor's land till he lead an adjudication. But if the creditor be already in possession, an adjudication is unnecessary: such a title, it is true, is requisite to complete the forms of the common law; but equity dispenses with these forms, when they serve no end but to load the parties with expence. And thus where the question is with the debtor only, equity relieves the creditor in possession from the ceremony of leading an adjudication upon his separate debt: and no person can hesitate about the equity of a rule, that is no less beneficial to the debtor by relieving him from the expence of legal execution, than to the creditor by relieving him from trouble and advance of money. Thus an executor in possession, is by equity relieved from the useless ceremony of taking a decree against himself for payment of debt due to him by the deceased: and for that reason, an executor may pay himself at short-hand. In the same manner, a wadsetter in possession of his debtor's land, has no occasion to  
attach



attach the rents by legal execution for payment of any separate debt due to him by the proprietor: his possession, by construction of equity, is held a good title; and by that construction the rents are held to be levied indefinitely; which makes way for the question, To which of the debts they ought to be imputed. The same question may occur where possession is attained by legal execution, without consent of the debtor. A creditor, for example, who enters into possession by virtue of an adjudication, acquires or succeeds to personal debts due by the same debtor: these, in every question with the debtor himself, are justly held to be titles of possession, to give occasion for the question, To what particular debt the rent should be imputed.

Having said so much in general, the interposition of equity to regulate the various cases that belong to the present subject, cannot be attended with any degree of intricacy. The road is in a good measure paved in the preceding section; for the rules there laid down with regard to debts of all different kinds, may, with very little variation, be readily accommodated

ted to the subject we are now handling. For the sake, however, of illustrating a subject that is almost totally overlooked by our authors, I shall mention a few rules in general, the application of which to particular cases will be extremely easy. Let me only premise what is hinted above, that the creditor in possession can state no debts for exhausting the rents, but such as are unexceptionably due by the proprietor: for it would be against equity as well as against common law, that any man should be protected in the possession of another's property, during the very time the question is depending, whether he be or be not a creditor. Let such debts then be the only subject of our speculation. And the first rule of equity is, That the imputation be so made, as to prevent on both hands irritancies and forfeitures. A second rule is, That, *in pari casu*, personal debts ought to be paid before those which are secured by investment. And thirdly, with respect to both kinds, That sums not bearing interest be extinguished before sums bearing interest.

It is laid down above, that where the legal of an adjudication is in hazard of expiring,

piring, equity demands, that the rents be wholly ascribed to the adjudication. But it may happen in some instances to be more equitable, that the creditor be privileged to apply the rents to the bygone interest due upon his separate debts: and this privilege will be indulged him, provided he renounce the benefit of an expired legal.

The foregoing rules take place between creditor and debtor. A fourth rule takes place among creditors. The creditor who attains possession by virtue of a preference decreed to him in a competition with co-creditors, cannot apply the rents to any debt but what is preferable before those debts which by the other creditors were produced in the process of competition: for after using his preferable right to exclude others, it would be unjust to apply the rents to any debt that is not effectual against the creditors who are excluded. This would be taking an undue preference upon debts that have no title to a preference.

Hitherto I have had nothing in view but the possession of a single fund, and the rules for applying the rent of that fund  
I
where

where the possessor hath claims of different kinds. But, with very little variation, the foregoing rules may be applied to the more involved case of different funds. A creditor, for example, upon an entailed estate, has two debts in his person; one contracted by the entailor, upon which an adjudication is led against the entailed estate; another contracted by the tenant in tail, which can only affect the rents during his life. It is the interest of the substitutes, that the rents be imputed toward extinction of the entailor's debt, because they are not liable for the other. The interest of the creditor in possession upon his adjudication is directly opposite: it is his interest that the personal debt be first paid, for which he has no security but the rents during his debtor's life. Here equity is clearly on the side of the creditor: he is *certain de damno evitando*, and the substitutes *de lucro captando*. And this coincides with the second case stated in the foregoing section of indefinite payment.



## C H A P. VII.

Powers of a court of equity to remedy what is imperfect in common law with respect to a process.

U Nder the shelter of common law, many act imprudently, many indelicately, and not a few act against conscience and moral honesty. The two first are repressed by censure, public and private : the last, a more serious matter, is repressed by a court of equity ; which will not sustain either a claim or a defence against conscience, however well founded it may be at common law. The party will be repelled *personali objectione* from insisting on his claim or defence. This personal objection is with respect to the pursuer the same with what is termed *exceptio doli* in the Roman law. I proceed to examples ; and first of the personal objection against a claimant. An informal relaxation of a debtor

debtor denounced rebel on a horning, is no relaxation; and therefore will not prevent single escheat. But the creditor on whose horning the escheat had fallen, craving preference on the escheated goods; it was objected, That he had consented to the relaxation, which removed the informality as to him; and that equity will not suffer him to act against his own deed. The court accordingly excluded him *personali objectione* from quarrelling the relaxation \*. In a competition between two annualrenters, the first of whom was bound to the other as cautioner; it was objected to the first claiming preference, That it was against conscience for him to use his preferable interest against a creditor whose debt he was bound to pay. The court refused to sustain this personal objection; leaving the second annualrenter to insist personally against the first as cautioner †. This was acting as a court of common law, not as a court of equity. The preferable

\* Forbes, 10th February 1710, Wallace contra Creditors of Spot.

† Forbes, 28th June 1711, Baird contra Mortimer.

annualreuter ought to have been barred *personali objectione* from obstructing execution for payment of a debt, which he himself was bound to pay as cautioner. In the Roman law, he would have been barred by the *exceptio doli*.

Next as to personal objections of this kind against defendants. A cautioner for a curator being sued for a sum levied by the curator, the cautioner objected, That the person for whom he stands bound as cautioner could not be curator, as there is a prior act of curatory standing unreduced. An endeavour to break loose from a fair engagement being against conscience, the cautioner was repelled *personali objectione* from insisting in his objection\*. A verbal promise to dispoise land is not made effectual in equity; because a court of equity has no power to overturn common law, which indulges repentance till writ be interposed. But a dispoinee to land insisting upon performance, the dispooner objected a nullity in the disposition. He was barred *personali objectione* from

\* Durie, 5th December 1627, Rollock contra Crofts.

pleading the objection, because he had verbally agreed to ratify the disposition \*.

There is one case in which the personal objection cannot be listened to, and that is, where an objection is made to the pursuer's title. The reason is, that it is *pars judicis* to advert to the pursuer's title, and never to sustain process upon an insufficient title, whether objected to or not. Thus, against a poinding of the ground, which requires an infeftment, it being objected, That the pursuer was not infeft, it was answered, That the defendant, who is superior, has been charged by the pursuer to infeft him; and that the defendant ought to be barred *personali objectione* from pleading an objection arising from his own fault. The court judged, That it is their duty to refuse action, unless upon a good title; and that no personal objection against a defendant can supply the want of a title †.

\* 22d February 1745, Christies contra Christie.

† Durie, 20th June 1627, Laird Touch contra Laird Hardiesmill; Stair, Gosford, 25th June 1668, Heriot contra Town of Edinburgh.

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